A

DISCOURSE

ON THE

LIFE, CHARACTER AND PUBLIC SERVICES

OF

AMBROSE SPENCER,

LATE

CHIEF JUSTICE OF THE SUPREME COURT OF NEW YORK:

DELIVERED BY REQUEST

BEFORE THE BAR OF THE CITY OF ALBANY,

JANUARY 5, 1849.

BY DANIEL D. BARNARD, LL. D.

J. MUNSELL, PRINTER,
ALBANY.

MEETING OF THE BAR.

At a meeting of the Members of the Bar of the county of Albany, held at the Mayor's Court Room in the city of Albany, on the 15th day of March, 1848, TEUNIS VAN VECHTEN was called to the chair, and AMASA J. PARKER appointed secretary.

On motion of Mr. TABER, a committee was appointed to prepare resolutions expressive of the sentiments of the meeting.

The chair appointed Messrs. TABER, GANSEVOORT, WHEATON, R. W. PECKHAM and J. LANSING.

Mr. TABER, as chairman of said committee, reported the following resolutions, which were unanimously adopted:

Resolved, That the shafts of death, which within a brief space past, have stricken down so many of the great and good of our land, clothing the nation in mourning, have approached us with appalling nearness, in the decease of Chief Justice AMBROSE SPENCER, one whose greatest usefulness and honors have been achieved in our city, who was personally known to us all, and endeared to many of us by the ties of private friendship, and whom we unite with the entire community to honor and revere, as an ardent lover of truth and justice, a firm and faithful friend, a preëminently patriotic and useful citizen, a distinguished statesman, a bright ornament of the legal profession, and a wise, enlightened and upright judge.

Resolved, That the gratitude of the present generation and of posterity, is due to the court of which the deceased was a distinguished member, for maturing the jurisprudence of this state, and exalting it to an eminence unsurpassed by that of any of our sister states or foreign nations; for transmitting the judicial ermine to their successors pure and un-

spotted, and impressing upon this community, by the wisdom and uprightness of their decisions, an habitual and abiding confidence in the administration of the laws.

Resolved, That while in common with the community, we mourn an irreparable public loss, we are not unmindful of the deeper grief of kindred bereavement; and that we respecfully tender to the family and relatives of the deceased our sincere and heartfelt sympathy under this afflictive dispensation.

Resolved, That we will attend the funeral of the deceased in a body, and wear the usual badge of mourning, and that the proceedings of this meeting be signed by the chairman and secretary, published, and a copy transmitted to the family of the deceased.

Resolved, That Messrs. NEWLAND, WATSON and JOICE, be a committee to make the necessary arrangements to attend the funeral.

Resolved, That the members of the Bar assemble at the Mayor's Court Room, half an hour before the time appointed for the funeral.

Resolved, That Mr. STEVENS, Mr. HILL and Mr. EDWARDS be a committee to fix on a time and place for the delivery of an eulogy on the deceased, and to select an orator for the occasion.

T. VAN VECHTEN, Ch'n.

A. J. PARKER, Sec'y.

In pursuance of the above appointment, the committee selected the Hon. Daniel D. Barnard, LL. D. to deliver the said eulogy.

Acordingly Mr. Barnard on the 5th day of January, 1849, delivered the following address in the county Court Room of the City Hall, of the city of Albany, to a large and most respectable audience.

The following correspondence ensued.

CORRESPONDENCE.

Albany, January 16th, 1849.

Dear Sir:

We beg to express to you on behalf of the Bar of Albany, their acknowledgements for the very just, appropriate and finished discourse delivered by you on Monday evening last, on the life and character of the late Chief Justice Spencer, and to request that you will oblige them, by furnishing a copy for publication.

With great respect,

SAMUEL STEVENS.
NICH'S HILL Jr.
JAMES EDWARDS.

Albany, January 17th, 1849.

Gentlemen:

I have received your note asking, on behalf of the Bar of Albany, for a copy of my Discourse of the life and character of the late Chief Justice Spencer, for publication. I thank you for the courteous terms in which this request is conveyed. I will in a few days, place the manuscript of the Discourse in your hands.

Very respectfully &c.

DANIEL D. BARNARD.

S. Stevens Esq.
N. Hill Jr. Esq.
Jas. Edwards, Esq.
Committee.

DISCOURSE.

GENTLEMEN OF THE BAR:

Not long after the death of the late Chief Justice Spencer, I was invited by a Committee of the Bar of this City, appointed to make arrangements for the purpose, to prepare and deliver, at some suitable and convenient time, a discourse on the life, character and public services of that eminent man. After considerable delay, exceedingly regretted by me, though, under the circumstances, quite unavoidable, having accepted that invitation, the present time and place were named by the Committee for the performance of the duty assigned me. I now enter on the discharge of that duty—a task which, as the committee will bear me witness, I had strongly desired to see committed to some hand abler than mine, yet one to which I bring willing powers, such as they are, with a most earnest and heart-felt interest in the work.

Considering the quarter from which the request has come for the preparation of this discourse, and that it is to be delivered before the Bar, as well as the fact that by far the greater part of the active life of Judge Spencer was spent at the bar, and on the

bench, it will be expected, I think, that I should confine myself mainly, in the notice I am to take of him, to his professional and judicial career and character — more especially to his character and services as a judge. This I shall do; though, of course, I can not omit all reference to the important part he bore, at times, in the political and public affairs of this state and of the country. Undoubtedly posterity will know him chiefly from his judicial labors; but we of the present time are too near, and too closely connected with the age in which he flourished, not to feel a strong interest in all those acts and passages of his life which go to make up his whole history, and without which neither his whole character, nor the whole debt which the country owes him, could be understood or appreciated.

Ambrose Spencer was born in the town of Salisbury, in the state of Connecticut, on the 13th of December, 1765. He came of a genuine New England stock. His father was a native of East Haddam, in Connecticut, and was, it is believed, the third in descent from the ancestor who emigrated to that state from the west of England. His mother's name was Moore, and her father, Jonathan Moore, resided in Simsbury, in Connecticut. His mother had him baptized in her infancy, by a clergyman of the Episcopal Church — a thing of comparatively rare occurrence, at that period, in the land of the Puritans. In this respect she must have held opinions not in accordance with the

usual faith of those by whom she was surrounded. And it required, at that period, in Connecticut, some good share of principle and courage, to maintain any doctrine and adhere to any practices at variance with the common standard of religious opinion, and especially those connected with Episcopacy, which was apt to be confounded, in the popular belief, with Romanism, and was deemed full of abominations. This circumstance, slight as it is, shows a degree of character in this Christian mother, which leaves us at liberty to infer that Judge Spencer was another instance, among many which the history of distinguished men furnishes, of the boy and the man taking his great qualities from his female parent; or, at least, having those qualities shaped and developed under the influence and guidance of her regulating hand. At any rate, he lived to feel and acknowledge, with devout thankfulness, the benefit and blessing of having been thus early introduced into the fellowship of the Christian Church.

But Philip Spencer, the father of Ambrose, seems to have been fully sensible of the importance of bestowing on his sons an endowment which he had wanted, and felt the want of, himself, and to purchase which for them, he was willing to exhaust his scanty pecuniary means. He resolved to give them the advantage of a liberal education, in spite of the *res angusta domi*, and the best which the scholastic institutions of the country at the period could afford. He had himself been brought up to

a mechanical trade, which he exercised and conducted till he was nearly forty years of age. He was a worker and dealer in iron. He carried on the business of his trade first in Salisbury, and afterwards in the town of North East, or the Oblong, as it was commonly called, in the county of Dutchess, in this state—a point of land jutting up between the Connecticut State line on one side, and the east line of Columbia County on the other. He removed to this latter place soon after the birth of the subject of this sketch, and there he lived and died. He was an ardent and active whig of the Revolution, and lent his aid in supplying cannon and other arms for the American service. About the year 1770, quitting his trade, he became a farmer, and it was mainly from his application to agricultural pursuits, and from the products of a moderate farm, with that attention to industry, economy and thrift, so characteristic of the race to which he belonged, that he wrung the hard-earned means by which the expenses attending the education of his children were defrayed. In the steady pursuit of the resolution he had adopted, his two sons, Philip and Ambrose, the former being the elder by two years, were early sent to the best schools within his reach. In these schools, however, they could not be carried much beyond the rudiments of learning, and in order to fit them for entering on a collegiate course, it became necessary to find a private instructor for them. They were placed under the care of a minister of the Presby-

terian order, whose name was Farrand, and who resided in the town of Canaan, in Connecticut. With this gentleman they completed their preparatory studies, and in the autumn of 1779, they were both admitted, upon examination, to the Freshman class in Yale College. Having spent three years at this college, the solicitude of the father to employ the best advantages for his sons, led him to the determination to transfer them, for the completion of their collegiate course, to Harvard University, at Cambridge. They were accordingly sent to Cambridge, and, after one year, took their Baccalaureate in the arts and sciences from that university, in July, 1783.

It will be observed, that the period of the college life of the two brothers was that of the last four years of the war of the Revolution. The year of their graduation was the year of the peace. The pecuniary embarrassments which pressed so heavily on the country, particularly in the earlier part of this period, were felt in every dwelling and at every fire side in the land — and especially wherever any thing more was to be attempted than to eke out a comfortable subsistence for the household in the strictest privacy and quiet of domestic life. The precious metals, never over-abundant, had been almost wholly displaced by paper money. This circulation began to lose credit early in 1777, and by the autumn of 1779, when the two brothers were to be placed in college, the continental money had become too abundant and cheap to be used as cur-

rency. Shortly afterwards it ceased to circulate at any price. The resort was then again, of necessity, to specie, which, of course, was scarce, and difficult to be obtained, and especially by a humble farmer in the interior of the country. Still, in this instance it was obtained, in sufficiently stinted measure, yet carefully laid aside, and accumulated for the special purpose which had become the great, absorbing object of interest to the parents of the young Spencers; and twice every year, Philip Spencer, the father, might be seen setting off from home with his two sons, all on horseback, equipped with saddle-bags, those of the sons holding their outfit of home-made clothing, and his own containing the hard dollars, hardly earned and collected together, necessary to pay their fare at commons, and their college dues for the current term.

Ambrose Spencer was not fourteen years of age when he entered college, and he received the honors of Harvard when he was only six or seven months past his seventeenth birth-day. This affords satisfactory proof not only of his resolute application to study, but of the strength and early development of those powers for which he afterwards became so remarkable. It is true that the range of studies in our colleges has been extended since that day; but instruction in the ancient languages and in classical learning, so far as it went, was quite as thorough then as it has ever been since, and the training, discipline and examinations were quite as severe. Among his classmates at Yale was John Cotton

Smith, and among those at Harvard was Harrison Gray Otis, and these distinguished men, along with others, have borne united testimony to the high standing he attained, and the brilliant promise which he then gave of future eminence. It must not be understood that I suppose the young graduate, any more than any other youth of promise, not yet eighteen, who has passed through his collegiate course, was or could have been, a thorough classical scholar. He was well instructed for his age, as is evident from the fact that he showed himself in after life to be a well-instructed man, though circumstances, as we shall see, seem to have quite forbid his employing much of his time, after he left college, in extending and perfecting his acquaintance with classical learning and literature. His Greek was neglected, and of course little of it finally remained to him, and from his imperfect knowledge of it at any time, he never held it in much estimation — unhappily, not an uncommon case among our practical men in this country, who have received what is called a liberal education. It was not so with his Latin. He maintained a competent acquaintance with that language, and it was in ready and familiar use with him, though he never found time or leisure to cultivate a profound and critical acquaintance with it, so as to be able to enjoy, to any great extent, the delights of its beautiful structure and harmonies, or the luxuries of its noble literature. With him, as with most of us in this country, life was a thing of action, of incessant

occupation, and of serious business, and in his case it was so from a very premature period.

Soon after leaving college, which was in July, 1783, he entered on the study of the law, under the direction of John Canfield, a lawyer and jurist of distinguished reputation, at Sharon, in the state of Connecticut, and there he prosecuted his studies till some time in the year 1785. It would seem that his intention all the while had been to make New York, and not Connecticut, his place of residence and practice; and it was not until he had advanced thus far in his studies that he discovered that, by the Rules of the Supreme Court of this state, an actual clerkship of three years in the office of an attorney here was indispensable in order to his admission to the bar of that court as a practitioner. Quitting then his residence at Sharon, he became a clerk and student in the office of John Bay, Esquire, of Claverack, in Columbia County, a lawyer of excellent standing at the period. He remained with Mr. Bay two years, when he entered the office of Ezekiel Gilbert, of the city of Hudson, in which he completed his term of clerical service. He was admitted to the bar as an Attorney of the Supreme Court in 1788, taking his Counsellor's degree at the end of two years, and soon afterwards his license to practice as a Solicitor and Counsellor in the Court of Chancery.

It is impossible to understand all the difficulties which beset the path of the young student at law, or all the motives which he had for uncommon exer-

tion and assiduity, or the impatience he must have felt to hasten, if it had been possible, the time when he should enter on the active business of professional life, without taking particular account of the fact, that, although obliged to make the smallest means suffice for his personal support, he had contracted a matrimonial alliance almost at his first entrance on his course of legal study. He was married to Laura Canfield, the daughter of his preceptor, on the 18th of February, 1784, and when he was only two months past eighteen years of age. He was turned of twenty-two when he was admitted to the bar, and he had then been married, boy and man, four years.

It is just and proper enough that an early marriage like this, and under such circumstances, should be set down in the rules of life, according to every notion of worldly wisdom, as imprudent and inexcusable. In this case, however, we are looking back on the event, with little left of it for us to speculate about. Our business is rather to set it down among the incidents of a remarkable personal history, and to note the influence it was calculated to exert over his future prospects and career, and its actual fruits and effects.

It must be confessed on all hands, where Judge Spencer was well known, that, at least, this act was one perfectly characteristic of the man. It bespoke an independent spirit, confident, and disposed to rely on itself, and its own energies. It bespoke a strength of resolution and purpose — such

as was so often displayed by him in after life—which no common, nor uncommon discouragements could shake, and which in men of fainter faith and feebler mental organization, might well be denominated rashness. What was only firmness and courage in him, would have been mere passion in many others. He no doubt felt within him at that early day, the stirrings of those strong powers which formed, not for speculation, but for grappling manfully with the practical issues of a life of activity and business even in its highest interests and affairs, gave him every confidence that at least personal success was within his grasp, and that, under the common allotments of a kind Providence, he could build his own fortunes. His marriage, at so early a period, into a family of the highest standing, and with a lady whom her contemporaries represent as a person of uncommon beauty and loveliness, considering his peculiar temperament and character, could only have had the effect to inspire him with new courage and steadiness of purpose, in regard to the course of life he had marked out for himself. There was at no time any wavering about his plans, or any disposition to strike out into any speculative operations which might seem to promise a shorter cut to life and business. He knew that business would come, and of the right kind, and enough of it, when he had made that full and thorough preparation for it, without which he did not deserve, or expect success; and ardent as his nature was, and impatient as he

might have felt at times, on account of the slow process of probation through which he was obliged to pass, still he was resolute and content to keep steadily to the path which he knew would bring him out right in the end. We can well believe that it was a severe trial to his temper and his resolution, when he found, after having passed in an office in Connecticut full one half of the period required in this state for clerkship and study in order to his admission to the bar here, that he was not one step nearer the goal then than when he had begun his studies. Nor was it a small aggravation of the discomforts of his position, that his removal to an office in this state involved the necessity of a long and painful separation from his youthful bride. She was to be left, for a considerable period, to the protection of her parents. And yet, painful and trying as all this was, it is easy to see that this very occurrence, adding as it did a year and a half to the term of his studies free from the distractions of business, finally brought him to the bar a much better instructed and more thorough lawyer than he would otherwise have been. And I am apt to believe that, in like manner, this early marriage, apparently so untimely and inauspicious, by cutting him off thus early from the allurements of society—not to say from fashionable dissipation—so irresistible, so absorbing, and oftentimes so destructive to young men, even of the best dispositions and inclined to the most innocent habits; by the stimulus to study and effort which it afforded; and by

the serious aspect which it gave, almost prematurely, to life, and its business and duties, is to be looked upon as having effectively helped him forward in his course, and aided him in making higher attainments, especially in the deep things of the law—in its noble elements and principles—than he would otherwise have achieved, previous to his entering on the absorbing labors of an extensive practice, and the exciting affairs of active life. *Ingenium res adversæ nudare solent, celare secundæ.*

The clerkship of three years which was required at that period, and long afterwards, in this state, of itself afforded a discipline and training to the student of the law, which was invaluable. At this early period particularly, before the introduction of printed forms, our system of practice, which, with some modifications, was that of the English courts, made the labor of drafting and copying very great, at least in any office where much business was done. It was oftentimes an irksome labor, and yet it was generally very cheerfully borne. Our forms had certainly become prolix and tedious, and needed correction—especially our pleadings, which required to be brought back to that brevity, nicety and logical precision which they had, after the hand of reform had been applied to them in England (as it had, at the same time, to all legal proceedings, and to the law itself) under Edward I.; not unjustly styled sometimes, the English Justinian. Still these forms of judicial proceeding, in many cases, no doubt, spread over too much surface,

embodied the law in its practical application to cases in hand; and every writ, and declaration, and pleading, and record, as well as every written contract, deed, will, or instrument of conveyance or of incumbrance on land, and a hundred other legal papers, which the clerk of that day was called on to prepare, or to copy, each and all conveyed invaluable lessons in the principles of the law itself; and these lessons were repeated often enough, and in such a variety of cases, to make him at last familiar, in spite of himself, by the time the process had been continued for three years, with the great leading doctrines of the law—just that law which he would be called on to assist in administering upon his entering on the practice of his noble profession. Nobody, certainly, who will look at that remarkable roll of distinguished names which have adorned the bar, and the bench in England, and in this country also where this system of practice has prevailed, and compare them with those in this country or elsewhere, who have been educated under other systems and forms of proceeding, can doubt the advantage which the law as a science has experienced, from the effect of this peculiar training to which I have adverted. Whether there have been incorrigible evils in this system of practice which have so weighed down its benefits, as to make an entire new Code of Procedure a measure of necessity or of wisdom—whether the law is likely to be better understood and better administered—whether the administrative justice of the

state is likely to be sounder, cheaper, and prompter under the new methods than under the old — these are questions quite foreign to the purpose of this discourse, and on which I do not here express any opinion. One thing, however, I will say — that if Judge Spencer had been trained to the profession under any system of legal procedure less rigid, exacting and severe, than that which obtained in this state in his day, though he could never have failed to exhibit a sagacious and superior mind, yet, in my opinion, he would never have been that thoroughbred, acute, discriminating and profound common lawyer which he certainly became.

It may be mentioned here that in 1786, while a student, Mr. Spencer received the appointment of clerk of the city of Hudson, through the influence, it is believed, of his friend and preceptor, John Bay. Mr. Bay held the office before him, and is said to have generously relinquished it in behalf of his pupil. This was a very timely favor, as the compensation, though small, was at that time a convenient addition to his limited means of support.

The period of his professional practice, from the time he took his Counsellor's license to his elevation to the Bench, was fourteen years. After the first three years, with an interval of one year only, he was constantly in public office, either political or professional, or both. In 1794 he was a member of the Assembly from Columbia County. The next year he was elected to the Senate from the Eastern District of the state, for three years; he took his

seat in January, 1796. He was reëlected in 1798, from the Middle District, into which Columbia had then been thrown, for four years. In 1796 he was made Assistant Attorney-General for the Judicial District, composed of Columbia and Dutchess, and in February, 1802, he received the appointment of Attorney-General of the State, which office he held till February, 1804, when he took his seat on the Bench as one of the Judges of the Supreme Court. Until this last period he had resided in Hudson; he now became a citizen of Albany.

From his first entrance on his professional career as a Counsellor of the Supreme Court, his practice was extensive and lucrative. His services were greatly in demand, and he was habitually in attendance on the higher courts, at the circuits, and oyer and terminer, and in bank, and he took part in the trial or argument of the most important and difficult causes. His name appears frequently in the volume of our earliest reported cases, in 1799,[1] and he was eminent at the bar long before that period. Three years before that, as we have seen, he was Assistant Attorney-General.

A cause of a good deal of note at the time, in which he was the leading counsel on one side, was argued before the Supreme Court in this city about the year 1800, or perhaps a little later, the incidents of which are well remembered by a venerable citizen, himself, in his time, a distinguished

[1] Johnson's Cases in the Supreme Court and Court for the Correction of Errors, vol. 1.

member of the Bar and of the Judiciary.[1] It was a suit between two gentlemen of distinction, very nearly connected by domestic ties, and belonging to families of the highest rank in the state.[2] As usually happens where near relations fall out, the parties had become terribly embittered towards each other. *Acerrima proximorum odia.* The cause involved and turned upon questions arising in the law of Tenures, one of the most abstruse and difficult branches in the whole range of jurisprudence, and with which the profession generally, at that day as at the present, had only a limited and imperfect acquaintance. The case was one which required the counsel to go far behind the abridgments and digests which were modern to their times—themselves elaborate works of great erudition and authority—to consult Littleton in his Book of Tenures, and Bracton in his Laws and Customs, and Plowden in his Commentaries, and even old Dyer, and the Year Books, and thus to run their investigations up to the fountains and almost hidden sources of the law. In such a contest it belonged to Mr. Spencer, naturally enough, to win a triumph. It belonged to him, on account of the higher reach and superior force of his intellect, so well fitted, and so apt, as his subsequent judicial career demonstrates, to make the path light about his own feet, which is full of darkness when trodden by others of less gifted powers. And besides all this, there is every evi-

[1] Hon. John Woodworth.

[2] The parties were Morgan Lewis and Thomas Tillotson.

dence to believe that, in his earlier and preparatory studies, he had not neglected to school himself under the discipline of the old masters of the law. The argument of the cause referred to, occupied several days, and called forth the highest powers of the counsel employed in it; and I have the best authority for saying that, opposed as he was by counsel among the most able and learned in the state, his superiority was too strongly marked not to be readily acknowledged on all hands. That cause was regarded at the time, I am told, as having established his preëminence among his brethren, for a more perfect and facile apprehension of the law in its more subtile, remote and recondite branches — as in the law of Tenures — than appertained to any of his contemporaries, perhaps with one exception. Richard Harrison, to whom I now refer, and who was much his senior, was no doubt a truly great lawyer, and he was thought, I believe, in his time, to excel all others in his familiar and intimate knowledge of the intricacies — the mysteries as they might well be called to most of the profession — of the Law of Real Estate.

The Bar of New York, at the close of the last century and the beginning of the present, when Mr. Spencer was at the height of his professional fame, showed an array of talent and legal learning of the highest order. The names of many of these have become historical, as the lights and ornaments of the law in their day, and, on an occasion like the present, they should not fail to receive at least

a passing notice from us, accompanied with our heartfelt homage to those who, as our elder brothers, have shed so much lustre on the profession to which we belong. Not to mention others of hardly less note and mark, there were, besides Richard Harrison, whom I have named before, Brockholst Livingston and Edward Livingston, both men of original and commanding ability; and Aaron Burr, the subtleist practioner of his time, and a most dangerous adversary; and Josiah Ogden Hoffman, a man of wit and of a varied and most attractive talent; and Abraham Van Vechten, full of solid learning and solid sense; and John V. Henry, acute, ingenious, logical, well-instructed, and eloquent; and William W. Van Ness, the rarest genius of them all; and, finally, the great Hamilton—great at the Bar, as he was great every where else—who moved along with the weight of the heaviest causes on his shoulders, with as much ease as Atlas, standing still, bears up the world. And these were the men, and others hardly less conspicuous and powerful, with whom Mr. Spencer was associated at the Bar, and with whom he was used to wrestle in high forensic debate; rarely, if ever, less than the equal of the best of them, and oftentimes *primus inter pares*.

The last professional service rendered by Mr. Spencer, before he took his seat on the Bench, and which delayed his entering on his judicial labors for some weeks after he had received his appointment of Judge of the Supreme Court, was in the great cause of the period—that of The People vs.

Croswell.[1] This cause was argued before the Supreme Court in February term, 1804. He had conducted the prosecution at the Oyer and Terminer, as Attorney-General, when the defendant, the publisher of a newspaper, had been convicted, under an indictment, for a libel on Mr. Jefferson, then President of the United States. The general history of this case, so famous at the period, and so important as having led to the settlement of the law of libel in this state, by legislative enactment and exposition, is familiar to the profession, and I should not be justified in dwelling upon it at much length. The connection, however, of Mr. Spencer with the case makes it proper that I should give it a passing notice.

The disputation at bar in this case, which, partly from the nature of the cause, being for a political libel and therefore enlisting and stirring up the feelings and passions of the hostile parties of the day, and partly from the fame of the eminent counsel engaged in it, attracted crowds of interested and eager listeners, had for its precise object to determine and settle the mooted point: what was, or rather what had been, the true common law of libel in England, touching the right of the defendant to give the truth in evidence in the way of justifying the language and publication of the libel. Whatever that common law should be found to have been, was clearly the law of libel in this state, and the court was bound to apply it to the case.

[1] 3 John. Cases, App. p. 344.

The Attorney-General insisted, from authority—chiefly that of the case of the Dean of St. Asaph, decided in 1784, in which the unanimous judgment of the court of K. B. had been delivered by Lord Mansfield in a most able opinion—that the point had been at rest in England, and wholly unquestioned since their great era of liberty, the revolution of 1688, down to the time of that case, and during all which time it had never been permitted to a defendant in a prosecution for libel, to give the truth in evidence as a justification. And he adduced the principle on which the rule had rested in England, which was, that the publication of a libel, on account of its tendency to a breach of the peace, was an unlawful act in itself, without regard to the motive, and not unlawful merely by reason of the particular intent; and for which, therefore, the truth did not, and could not, constitute a lawful excuse. As the real question was, not what the law ought to be, but what it was—not what the popular sentiment of the country and the time would have it, but how it was settled by the concurring testimony of the independent ministers of justice for the clear period of a century of English freedom—it would be difficult, in a calm review of the whole matter to-day, to say that the argument of the Attorney-General, in its principles and positions, which seemed impregnable, (and his argument is represented to me, by a competent judge who heard it, to have been of the very highest order of excellence,) was, or could have been, overthrown by his adversaries,

although the law itself might have been, and seems to have been in effect, overborne by the resistless power of their appeals. It is doubtful if such another combination of learning, genius and talent has ever been arrayed on one side of any cause, in this state, before or since, as that which stood up for the defence in this case. Richard Harrison, William W. Van Ness, and Alexander Hamilton—such were the men who appeared and argued this cause for the defendant; and it is doubtful if any other three men among all the great legal minds that have graced and illustrated the Bar of this state could be named, who together could make up the prodigious sum of their ability. The great argument, however, for the defence was made by Hamilton—the greatest, I suppose, no doubt, of his own professional life, and probably, taken in all its aspects and character—in its comprehensiveness, its adaptedness to his purpose, its essential wisdom, and its awful power—the greatest ever made at the Bar in this state by any body, and it might not be extravagant, perhaps, to say, greater also than any other man who has ever lived in this state has been intellectually competent to make.

Hamilton contended for the great principle, that, the intent being of the essence of all crime, it was the province of the jury, in the case of a libel as in all other cases of imputed crime at common law, to acquit or convict generally, according to the intent, and that to enable the jury to judge of the intent, it was indispensable, if the libel was true,

and not false, that they should know it. He admitted, however, that the truth was not to be taken in every case as a justification; and this involved the necessity of his taking the bold measure of framing an entire new definition of libel—in itself, as it seems to me, a tacit admission that the law had never been understood in that way in England, and that the common law of libel and his definition were at variance. He framed and presented that remarkable form of words, to define how and when the truth should justify the use of libellous language, which were soon after adopted, *in hæc verba*, by our Legislature, and have become, and are likely long to remain, the undisputed test of the law of libel, in this state. "If the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party is to be acquitted, and the jury has the right to determine the law and the fact."[1] Such was the formula, and such is the enactment. But when Gen. Hamilton, instead of looking to the current of judicial decisions which had transpired in successive generations, to find a custom resting in immemorial usage and universal reception, and thus to determine what the common law of the case really was, turned away to search after a better rule of ethical philosophy than seemed to have prevailed—at least one more favorable to the liberty of the press—and insisted on calling that the law of the case, it is impossible not to see that there was a kind of confession in all this, that,

[1] 1 Rev. Stat., p. 94, sec. 21.

after all, the Attorney-General had stated the common law truly, only it was not, in the opinion of the counsel, exactly what it ought to be. What he insisted on was, "that the common law was principally the application of natural law to the state and condition of society," and he would have the court adopt the rule he laid down *as* the natural law, properly applicable to the state of society in a land of popular freedom. Perhaps it is not too much to say, that the essential wisdom of the rule he presented, according to the almost universal sentiment among the wise and prudent of his own and subsequent times, alone rescues the effort he made to have it adopted by the court as the rule of the common law, from the reproach implied in the language of Sir Matthew Hale, that the common law "is not the product of the wisdom of some one man, or society of men, in any one age; but of the wisdom, counsel, experience, and observation, of many ages of wise and observing men."[1]

I dismiss this case with remarking that the judges being equally divided in opinion, the motion for a new trial in the case was lost, and the law therefore stood as it had been laid down at the trial of the indictment. The defendant, however, had a triumph on his part, as no motion was ever made to proceed to judgment upon his conviction. It should be stated also, that the first attempt made to amend the law of libel by the Legislature, which followed promptly on the heels of this celebrated

[1] Preface to Rolle's Abridgment.

discussion, was defeated by the Council of Revision, on the ground that the act allowing the truth to be given in evidence, did not sufficiently discriminate in regard to the nature, tendency and intent of the libel. At the next session, however, in 1805, Mr. Van Ness, then a member of the Assembly, prepared a law in the language now found in our statute, which received the unanimous sanction of the Legislature.

And this ends all that I shall think it necessary to say of Mr. Spencer's professional career; for though, after leaving the Bench, and nineteen years after he had left the Bar, he temporarily returned to it and resumed his practice as a counsellor at law, by way of occupation, and perhaps from the force of early habits, yet it was not long continued, and after a very few years, having found sufficient occupation in other employments more agreeable and congenial to him in his advancing age, it was wholly relinquished. Though he could not fail, as he did not, on his return to the Bar, to meet with much success, yet I am not aware that there was any thing in this brief portion of his history which I ought to notice in a more particular manner.

Before entering on the consideration of his term of judicial service, it is proper that I should advert briefly to so much of his political history as is comprised in the period preceding his elevation to the Bench.

Ambrose Spencer was ten years old when the war of the Revolution broke out, and he was seven-

teen, and so far advanced towards manhood as to be the graduate of a college, at the epoch of the Peace of 1783. The scenes and events of that memorable period had not passed by him without the most interested notice, and they had made a strong and irradicable impression upon him. With his father and family, all his feelings and sympathies had been enlisted on the side of the Whigs. The year in which the Convention was held in this state for the adoption of the Federal Constitution, was the year of his admission to the Bar, he then being nearly twenty-three. The first formation of political parties in this state, as elsewhere in the country, had reference to the formation of a Federal or National Government, and especially to the great and absorbing question of the Constitution as framed and proposed to the country by the Convention at Philadelphia. It was a question and a contest which involved the national existence and the destiny of the country, and never were political parties formed, in any country, on an issue of more awful import. It seemed at one time inevitable that the Constitution must be sacrificed by the refusal of this state to accept and ratify it. It met with the most determined opposition of George Clinton, then governor of this state, backed by a party of such overwhelming force, that full two-thirds of the Delegates to the Convention, when they convened at Poughkeepsie, were understood to be utterly opposed to ratifying the Constitution. The Federalists of that day were those who favored an efficient

Federal Government, and who were for adopting the Constitution as it was presented; and all their hopes of the country rested on the success which should attend their efforts in this behalf. In this state, the feeling which the alarming condition of things excited towards Gov. Clinton — the head of the opposition, and deemed responsible for his party — and towards that party itself, was necessarily very strong. Mr. Spencer was not of an age or in a condition to take any very prominent part in the struggles of that time, but it is certain that he enlisted strongly on the side of the Federalists, and was a warm advocate for the Constitution. He entered life, therefore, as a Federalist, and he was first elected to political office as a member of the Federal Party.

When the Constitution had been adopted, and the Federal Government had gone into operation under Washington, with the acquiescence of the whole country, all original causes of difference between the two parties seemed to be at an end. Still those parties, in this state, kept up their separation, though there certainly seemed very little in the way of principle to divide them. They did not forget, however, the embittered feeling which had been engendered about the Constitution. On the one side, the Federalists, comprising in the main the most distinguished and able men in the state, were almost exclusively in the enjoyment of the patronage of the General Government, chiefly perhaps, through the influence of Gen. Hamilton; and this appears

to have kept the Anti-Federalists together, under Gov. Clinton, through whom they enjoyed, with few exceptions, the patronage of the State Government. Gov. Clinton and his party held the ascendency, till the election of 1793, when the Federalists secured a majority of the Assembly; a change which was due undoubtedly to the shock which had been given to the public sensibility and sense of justice, the preceding year, by the action of the state canvassers, universally reprehended and condemned, I believe, at the present day, which displaced Mr. Jay, after he had been fairly elected governor by an undisputed majority in the popular suffrage, and reinstalled Mr. Clinton in office. At the general election of this year (1793), Mr. Spencer was chosen a member of Assembly, and took his seat in January, 1794.

The movements and acts of the Assembly at this session were, on the whole, of more account to parties, perhaps, than of concern to the interests of the state. The Assembly held the choice of the Council of Appointment—the great fountain of official honors—and the prevailing party promptly moved in this matter, bringing into existence, for the first time, a Federal Council. In this, as in the other business of the session, so far as the Assembly was concerned, Mr. Spencer stood prominently by the side of his friend; Mr. Josiah Ogden Hoffman, and they, together, manifestly had the lead in that body. It was the avowed, and no doubt was in fact, a principal object, of the somewhat hasty creation of the

new Council, to secure the appointment of Egbert Benson, then held in the highest repute as a most learned and able lawyer, though of the old school, as an additional judge of the Supreme Court, instead of Peter W. Yates, who was known to be the favorite candidate of the other party. Mr. Benson received the appointment.

The election of the next year, 1795, carried Mr. Jay into the gubernatorial chair, with a majority friendly to him and his administration, in both branches of the Legislature. Among the senators elected, was Ambrose Spencer. I hardly need say, that for the seven years of his continued service in that body, he was a prominent and leading member. Indeed, from the commencement of this senatorial service forward for twenty years, he exercised a prodigious influence, and a sway over the political affairs of this state, extended at times to those of the government at Washington, second to no other individual. This was a personal influence, due to the strength of his intellect, his energy and activity, his boldness and decision, and the general weight of his character, rather than the result of any official power or patronage ever wielded or directed by him. It was characteristic of him to be decided, active, and zealous, whatever measures, or policy, or party he espoused. Separated by the occurrences of 1788 from Gov. Clinton and the party which opposed the Constitution, he was the friend and supporter of Gov. Jay, and down to 1798, whether in the Assembly, or the Senate, or in the Council

of Appointment, of which he was a member in 1797, he acted uniformly with him and the Federal Party.

In the spring of 1798 he was reëlected to the Senate, having at that time taken his stand with the party now called Republican, which, in this state and in the nation, had united to oppose the policy and administration of John Adams. A change of party is not always a change of principle — though it is quite apt to be so considered, and often is so in fact. Nor is a change of political sentiment always proof either of a want of principle or a want of sense. In this case I have not been able to discover that it was much more than a partial change of personal association. It did not follow, because he had favored the Constitution, and desired to see the government under it carried into efficient operation, and so far had been a Federalist and acted with the Federal Party, that he must therefore approve of all the measures, and of any policy which any administration of that government, calling itself Federal, might see fit to adopt. It did not follow, because he approved the administration of Washington, that he must therefore approve that of Mr. Adams. The election of Mr. Adams originally was distasteful to many leading Federalists. Mr. Jay favored it, but Gen. Hamilton did not. Many prominent Federalists all over the country, either then, or soon after, wholly abandoned the Federal Party, and attached themselves to the Republicans. This state afforded many notable examples. Not

to name others, Mr. Ezra L'Hommedieu, a member of the Senate, and a very leading politician of the time on the Federal side, left that party in 1797. Chancellor Livingston, the man to whom, along with Hamilton, is due the credit of having carried the Constitution of the United States through the State Convention, and who brought into the political field, whatever side he espoused, a larger and more powerful train of personal and family adherents, by far, than any other man in the state, quitted his Federal associations, and took his station and rank with the Republicans, at a still earlier period. And nothing could more strongly show the balancing state of opinion among the political men of the period, and the quite prevalent distrust, if not of the Federal Party, at least of some leading Federalists, and particularly of the course and policy of President Adams, than the fact that, in the legislative session of 1799, with a decided Federal majority in the Assembly, it was frequently found that, in political questions, the Republicans carried the house. There were eight or ten members, some of them leading politicians, who had been elected as Federalists, and who still voted with their old associates on all personal questions, but were against them on many questions growing out of national politics. Mr. Spencer, as I have said, went down to the election in the spring of 1798, a decided Republican. He was elected, but in a minority. Mr. Jay was re-elected Governor over his opponent, Chancellor Livingston, and the Legislature was decidedly Fe-

deral. That party had the Council of Appointment. And it deserves to be remarked, that when he took his new position, with so much decision and independence, the administration and patronage of both the national and state governments were in the hands of the Federal Party, and so continued for two years afterwards.

In the honest estimation of many at that period, the practical question actually arose and presented itself, whether a representative republic, resting, in its elective feature, on the democratic element, like that contemplated by the Constitution of 1787, could be maintained, or whether it was not necessary to give the executive, by construction and gradual encroachment, more vigor and a more commanding power, and thus in effect, as the least thing to do, to change the government to a mild, elective monarchy. It was known that there had been those who, in the beginning, had no faith in a popular government, and it was not known that they had given up their opinion, and a lively apprehension began now to be felt, or it was powerfully revived, that the policy of the Federal administration was purposely shaped to bring about an insensible change, and to make the government strong enough, in the person of the executive, to control and subdue the supposed tendency to popular domination. I speak of the fact of the existence of such an apprehension, not in the popular mind only, but among intelligent men, without stopping to enquire, or giving any opinion, whether there

was any real foundation for it or not. Mr. Spencer took part with those amongst whom such fears or suspicions were indulged, and who opposed all acts or measures which, in their judgment, tended, or were designed, to strengthen the executive at the expense of the legitimate authority of Congress, or any other department. He was for a republican government, and a republican administration, with the power of the great departments preserved in due independence, and free from all manner of encroachment, according to the plain meaning of the great American Charter; and having set out with these sentiments at the earliest period when any practical occasion for them seemed to arise, he appears to me to have adhered to them faithfully, through all times and all changes, to the end.

Mr. Spencer contributed largely to the success of the Republican Party in the elections of 1800, state and national. The Legislature of this state chose Republican Electors, and, as every body knows, Mr. Jefferson was the candidate of the party for president, and Col. Burr for vice-president. The Electors were to meet at Hudson. Some apprehension was felt from the outset, lest the intrigues of Col. Burr should put his name ahead of Mr. Jefferson's in the electoral colleges, where, under the constitutional provision of that day, two persons were to be voted for without expressing any preference between them. With or without cause, a suspicion came to be entertained of one of the twelve Electors for this state, known to be much under the influence of

Col. Burr; it was thought a possible thing that he might leave Mr. Jefferson's name out of his ballot. A confidential meeting was held at Mr. Spencer's house, in Hudson, on this subject, when, under his direction, a plan was digested for defeating any treachery towards Mr. Jefferson, if any was intended. This was to be done, by causing a proposition to be made in the college, as if to give all an opportunity to shew their fidelity, that each member should lay his open ballot on the table, before depositing it in the box. The device was successful.

It was in the legislative session of 1800, that Mr. Spencer and Mr. De Witt Clinton, were chosen to be members of the Council of Appointment. And from about this period may be dated that well known and remarkable political union between these great men, cemented by a friendship of the closest intimacy, which continued, with the exception of a brief but painful season of estrangement, till death dissolved it, and which, for a quarter of a century, exerted a marked and signal influence and power over parties, and politics, and affairs of government, in this state and in the nation. The new Council met for the first in February, 1801, and then began a controversy between these gentlemen and Gov. Jay, whose term of office had not yet expired, in regard to nominations and appointments to office, which forms a chapter in our history of a good deal of notoriety among political men. I shall not enter into that history. In Gov. Clinton's time, the Federal members of the Council

had set the example of claiming an equal right with the governor of nominating to office; and the Republican members of the Council now set up a similar claim. Every body must regret, at this day, that such a claim was ever made by any body; and so must every body regret the spectacle which followed—that of a State Convention, sitting "in the name and by the authority of the people of this state," professing gravely to declare their solemn opinion and judgment, that by the true construction of the Constitution of 1777, the right to nominate was vested concurrently in the governor and in each member of the Council!

It is worth remarking, as showing the utter and universal repugnance felt, in the earlier days of the Republic, to the familiar doctrine and practice of this day in regard to the party use of the power of appointment, that up to the period now referred to, such a thing as removal from office on account of the political opinions of the incumbent was wholly unknown. And when the controversy just alluded to took place, about the right of nomination, it was not on any attempt to bring about removals—the whole question was on filling vacancies. And after that dispute had been decided, and the same Council—Mr. De Witt Clinton and Mr. Spencer having the lead and direction in it—subsequently entered on the work of making removals, under the strict limitations of a moderate rule which they had laid down for their action, and by which they no doubt honestly intended to be governed, George Clinton,

who had then been once more installed in the office of governor, utterly refused to give the practice the sanction of his name, and even caused his solemn protest to be entered against some of the removals, on the journals of the Council.

It happened unfortunately, that, under the Constitution of 1777, the Executive and Council held a patronage, in the appointing power, which, as the state grew in population and extended its civil jurisdiction, was quite too large to be at all convenient or safe — at least in the hands of politicians and party men. All the state officers and heads of executive departments — except the treasurer — and nearly all other officers in cities and counties, judicial and executive, civil and military, received their appointments from the Governor and Council; and, except the Chancellor, and Judges of the Supreme Court, and First Judges of County Courts, and Sheriffs and Coroners, all the rest held their commissions by the royal tenure of the pleasure of the Council of Appointment.

When the Republican Party came into power in 1801, all the public places of honor or profit in the state, with singular exceptions, were in the hands of the Federalists. Office gives consideration and influence, as well in the obscure town; and in the county and city, as at the capital. And it was undoubtedly the opinion of Mr. Spencer at that time, that it was only unjustly endangering the continued ascendancy of the Republican Party, and their principles and policy, in the state and in the nation, to

allow such an amount of political influence as that which the whole banded army of officials in the state could bring to bear on the elections, to rest and remain as a monopoly in the hands of their adversaries. Mr. Clinton took pains to make his opinions on this point publicly known, and it is presumed that he and Mr. Spencer were agreed in the matter. He claimed that the heads of the Executive Departments should be men whose opinions accorded with those of the dominant party, and as to the offices generally, that his own party ought to have at least an equal share with their opponents. Of course, it is seen at once that this rule involved the necessity of making removals. It would not do to wait for vacancies. Nor can it be said, in the case of a party having any real principles or peculiar policy to maintain, that such a measure, under such a limitation, would be harsh or proscriptive. Any meddling with public offices by a party or faction without principle, and seeking nothing but spoils, is proscription. But it can not be considered as proscriptive, for a successful and dominant party, having any distinctive doctrines or measures to stand upon, to say to their opponents — we will divide the offices with you, first taking to ourselves those through which the administration is to be immediately conducted. And it must be considered also, that if it was wrong for the in-coming party to claim half the offices, it could not have been quite right for the other party, because they had had the power, and while they had the power,

to monopolize the whole. There was at least as much proscription in the one case as in the other.

I have not been able to find, and I do not think, that the limitation which these gentlemen prescribed to themselves in this business, was materially exceeded, while they acted personally in the Council of Appointment. It is true, the practice afterwards obtained of making a clean sweep of all the offices at every alternation of party supremacy; and the example set by these gentlemen in 1801, is often referred to as the beginning, and, with those who wish to justify it, as a justification, of this policy of considering the offices of the country as the legitimate property and spoils of every victorious party. I hold this to be unjust to the memory of Judge Spencer. It should be recollected that of the two friends, Mr. Clinton had no other profession than politics. It was the business of his life. On the other hand, Mr. Spencer, through the whole period in which his political influence was most exerted and most felt, was deeply engrossed with the business of his profession, or with his judicial labors. And while, therefore, as well at the particular period of which I have been speaking, as afterwards, his association with Mr. Clinton in friendship and in politics was intimate and confidential, and while he, no doubt, took his full share in settling the general principles and policy on which they should act, yet it may well be supposed, and is undoubtedly true, that the necessary details of business, and especially of party operations, were confided to and

conducted mainly by Mr. Clinton. And if Mr. Clinton could be accused of having, at any time, used the weapons of party with too unsparing a hand—and he was by no means the greatest sinner, in this way, the country has produced—he had the redeeming merit of proposing, and keeping steadily in view, as the true end of his political success and ascendancy, the most noble and statesman-like objects, of the highest interest and value to his state and to the country. And as to Mr. Spencer, I have reason to know, that he had often occasion to feel and lament that he had no power to prevent excesses in the use of the enginery of political warfare, and that he did, from his heart, deplore and condemn that reckless use, and abuse, of the power of appointment, which finally became the common law of all parties.

I shall not dwell longer on this portion of Mr. Spencer's political history. I will only add here, that when in 1802, he received the appointment of Attorney-General, it was on the voluntary resignation—not removal—of Mr. Hoffman, who, a Federalist, had held the office since 1795; and that when he was appointed to the Bench in 1804, it was to fill a vacancy occasioned by the resignation of Judge Radcliff.

From 1804 to 1823, was the period of his judicial service. When he came on the Bench he had James Kent, Brockholst Livingston, and Smith Thompson for his associates—the last two having been appointed the preceding year, by the Council

of which he and Mr. Clinton were members. In 1807, William W. Van Ness took the place of Judge Livingston; Jonas Platt came in, in 1814, when Chief Justice Kent was made Chancellor; and in 1819, John Woodworth—on whom the office had been urged nearly twenty years before, but then declined—took the place of Judge Thompson. At this time (1819,) Judge Spencer became Chief Justice. After this enumeration, I hardly need say that during his whole term of service, he was associated with very able judges; and if he maintained from the first a position of eminence and marked superiority among his brethren—as I suppose it must be conceded he did—it was not because he was surrounded with feeble or inferior men. Quite the contrary. All the gentlemen I have named were men of superior ability, and good professional learning; several of them possessed talents of the highest order, and exactly of the kind which fitted them for a high judicial station. One of them, James Kent, I suppose has not had his superior, for variety and vastness of legal erudition, in or out of this country, in the present century. Perhaps of the whole of them, the one who was less indebted to books and to laborious study for his qualifications than any other—*abnormis sapiens*—was William W. Van Ness; he was indeed a man of wonderful ability. He seemed to know every thing that was necessary for a man and a judge to know, and yet it was difficult to tell how he came by his knowledge. Nothing he ever said or did seemed to cost

him an effort; yet there was a power and a strength in his intellectual movements which every body felt who witnessed them. It was not a power which awed any body; it was gentle, unpretending, unconscious—but it was resistless. And this high intellectual power was joined to a sweetness of temper, and a kindness, along with a native dignity of manner, which cast a nameless grace and charm about him that made his presence felt as a spell on all who came within its influence. And who can now think of the brilliant and noble hearted Van Ness, as he moved among his brethren of the Judiciary and the Bar, admired and loved of all, seemingly as pure in spirit and in purpose as he was gigantic in his intellectual proportions, and think how he was finally cut down by a cruel wound inflicted on his sensitive nature—the victim, not of offence, but of appearances—not of wrong even meditated, much less done, but of the disinterested yet too inconsiderate zeal and service of a friend—who can think of him without mingling with the admiration which his character so strongly inspires, a feeling of sadness, of oppression and sickness of the heart, for a fate so severe and so undeserved!

Judge Kent had been on the Bench of the Supreme Court since 1798, and he was made Chief Justice the same year in which Judge Spencer received his appointment. With the appearance of Judge Kent on the Bench, the Supreme Court may be said to have first entered seriously and in earnest on its great work—that of building up and

consolidating within this state a system and body of common law, applicable and adapted to the government and institutions of the country. Up to that time, the administration of the law had been conducted in a very inefficient and unsatisfactory way. The cases that came before the court were slightly examined, both at the Bar, and on the Bench, and the principles and foundations of the law were very little explored. It was the metal which happened to lie on the surface that was picked up, whether of sterling value and really fit for use or not, but there was no deep mining after the ore in its hidden and purer sources. The Bench had not been without respectable talent and legal learning, but these had not been applied in that thorough, laborious and business-like way, so necessary to give strength and character to the court, and to the law. It is a fact, however, that one of the number, Judge Hobart, who for twenty years had aided to give the decisions of the court such strength and character as they had, was not a lawyer—he had not been educated to the profession of the law! The judges did not write out their opinions—not even in the most important cases; and if they had done so, they had no reporter, and no way of making their decisions public and historical. It is a very material and interesting fact, for which we are indebted to the able and accomplished eulogist of the late Chancellor Kent, that it was his practice, promptly begun, of bringing to the consultations of the judges, opinions, in all im-

portant cases, carefully written out, after the most laborious examination of the cases and of all the law applicable to them, to which the law is indebted for that entire change in the habits of all the judges, which opened the way for the rise of that orderly and admirable system of jurisprudence in this state, of which we have the invaluable record in our reports of adjudged cases. Still it must be observed, that no attempt was made at regular reporting till 1803; and it was not till 1804, the year of the commencement of Judge Spencer's judicial labors, that the Legislature was induced to give authority to the Supreme Court to appoint a reporter, and made some provision for his compensation. An attempt was, indeed, made afterwards to gather up some fragments from the past labors of the court, but it was found that all that could be recovered, or that seemed fit to be preserved, lay this side of the year 1798. I mention it as a fortunate occurrence, that the business of reporting for the Supreme Court fell into the hands of that able and accomplished legal historiographer, William Johnson, within a year after Judge Spencer came on the Bench, and was continued in the same hands during the whole period of his judicial labors and achievements. To the twenty volumes of the reports of Mr. Johnson we may look for the faithful record of these labors and achievements; and they are a monument to the fame of Judge Spencer such as brass and marble could never build. "We should have known," says Kent in his Commentaries, "but very little of

the great mind and varied accomplishments of Lord Mansfield, if we had not been possessed of the faithful reports of his decisions." And as little should we know of the great mind and eminent services of Judge Spencer, but for the faithful reports of Mr. Johnson.

We shall form a very imperfect conception of the real value and importance of the services rendered by him to this state, and the country, as also of the services of the Old Supreme Court, as it is usually called with us, if we do not look back a little to consider the state of the law before their time, and what it was that the judges of that period were called on to do. The common law was the birthright of the American people. They regarded it as an important branch of their rights and privileges as freemen. It was made the subject of a distinct resolution in the Declaration of Rights by the Continental Congress of 1774, "That the respective colonies are entitled to the common law of England."[1] Every colony claimed it for itself; and as soon as a separation from the mother country had taken place, every state took care to make it the basis and substratum of all its laws. In this state, the Constitution of 1777 adopted the common law of England as it existed on the memorable 19th of April, 1775; and the Legislature was expressly forbidden to create any new court which should not proceed according to the course of the common law. At the date just named, the common law existed in a favorable and

[1] Journals of Congress, 1 vol., p 21.

improved condition in England; but it was not in all cases applicable and adapted to the circumstances of our people — especially after they ceased to be colonists. And hence the great work that devolved on the master minds of our jurists. Besides, in innumerable cases, ascertaining and declaring what the law was, as it had existed in England, through a laborious search into the foreign records, histories, and treatises, in which alone it could be found, and bringing it here to give it a practical application in its home on our shores — besides this, there was another and a vastly higher work to be done, by adapting and applying its great leading principles and elements to the new cases arising in the peculiar condition and habits of our country and our people — a condition in many respects quite novel, and in some respects, at least, as we believe, altogether improved from that of any people where this system had been before applied. In short, the law itself was to have an improved condition under the influence of our liberal forms, our free religion, our varied and oftentimes novel business and occupations, and the peculiarity of our social relations, until, in the language of Kent,[1] it should "become a code of matured ethics, and enlarged civil wisdom, adapted to promote and secure the freedom and happiness of social life." It was such a work as this, in which our jurists were to engage. They were to give our people the common law, in all the original strength and majesty

[1] 1 Kent's Com., 342.

of its noble principles, and yet, in many instances, modified and improved to adapt it to what *we* believe to have been an advanced and improved social condition. Material alterations and substantive amendments must be made by the legislative power, which must also interpose, at times, to resolve doubts, by declaratory enactments. But the burthen of the work devolved, after all, on the judges. All those silent and insensible improvements of the law which go properly under the name of progress, as well as all that variety of new application which the exigencies of the country and the times would call for — all this was work which devolved on the judges. And if it was a part of their duty to apply the principles of this code to work out, as they might, from its grand elements, an improved and higher development, suited to an advancing civilization, an advancing freedom, and a morality advancing and growing, it was hoped, in religious purity, and so gradually to build up a body and system of law in some measure peculiar and American; it was equally their duty carefully to preserve and maintain the substance and distinguishing features of that good old English Jurisprudence which, under the name of the common law — pervading, as it does, the community that is blessed with it, like a healthy and invigorating atmosphere — had long been the just boast of our fathers, and without which neither English liberty, nor American liberty, would have had an existence. Not always an easy task this to which I now refer, in the pre-

sence of that restlessness and desire of change, always observable in a community thoroughly awakened and free — in the presence of that impatient disposition which, with more activity than reflection, more ingenuity than judgment, and more speculation than wisdom, falls to experimenting on the weightiest matters — government, religion, society and law — for the chances of finding some better way, at least some other way, than the good old way, in every thing — *diruit, ædificat, mutat quadrata rotundis* — and which can not wait for that natural growth and steady development that, in the moral as in the natural world, alone constitute true progress; just that progress which has made the common law, having a principle of growth and progress in itself, what it is already, though far from having attained all the perfection it is capable of, the most complete and admirable system of law — the most healthy and vigorous in its principles, the most favorable to civil liberty, standing the nearest to the divine law, and the best fitted to be the auxiliary and helper of religion itself in the government of individual men and of human society — that has ever existed on the earth. The firm maintenance of the common law in the Common Law Courts — leaving the rules of the civil law, so invaluable in particular cases, to operate in Chancery, and in certain courts of special jurisdiction — the maintenance of the common law in the Common Law Courts, not always free from the danger of being injuriously invaded and innovated upon, under the

loose notion of a superior equity — witness the instance of Lord Mansfield's innovations on the old English law, which his successor, Lord Kenyon, so sternly interposed to correct — this it was which in the earlier period of our judicial history, and before the body of the common law, as applied here, had acquired the compact and consolidated form it now has, became the stern, and sometimes difficult duty and province of our judges.

We must not fail to observe, that at the time when Judge Spencer took his seat on the Bench, very little, comparatively, had yet been done any where in this country, towards constructing that comprehensive and admirable system of American common law, which certainly existed at the close of his judicial labors. The Federal Courts in their higher jurisdiction, were occupied with questions of constitutional law, rather than in the exposition and application of the rules of the common law; and John Marshall had only begun his administration of the law in the Supreme Court of the United States in 1801. The first volume of Cranch's Reports of the decisions of that court, was not published till 1804. There were not, up to that time, above half a dozen volumes of reports, if so many, from all the courts in the United States, and these contained comparatively little of importance or particular merit. Theophilus Parsons, the great light and luminary of the law in Massachusetts, was not brought on to the Bench till 1806. When there, and while his short but most brilliant judicial

service lasted, there were, I think, no two jurists in the union, so nearly alike and equal, as himself and Judge Spencer, in all those peculiar characteristics and qualities which fitted them both for so distinguished a career. The first beginning for a system of American law, had undoubtedly been made in this state, from the period — the epoch it should be called — of Judge Kent's appointment to the Bench, and was due to the force of his eminent talents and great learning, and the new example he set of patient labor and thorough research. But it will be remembered also, that it was not till 1804 that the first volume of reports from our Supreme Court was published. Judge Spencer entered therefore on his new field of labor, with very little aid from the labors of his predecessors in the various courts of the country, and when, in truth, nearly the whole vast structure of our American common law was to be reared, almost from its foundations.

And now let it be remarked that within the period of his service on the Bench, a comprehensive system, a great compact body and code of common law, however capable of improvement and extension afterwards, applicable and actually applied to the vast and varied concerns of a populous community, in a condition of high civilization, was built up. In this work, far be it from us to disparage the valuable labors of many able judges in other state courts, and in the courts of the United States; but I believe it is only just to say that, at the close of the period referred to, by far the most valuable,

reliable and authoritative record of American common law was found in the twenty volumes of Johnson's Reports of judicial decisions in this state. And far be it from us also, in the just tribute which we offer to that great man whose services we are now particularly commemorating, to do less than full justice to the other eminent men with whom he was associated in his judicial labors. There were very able and learned men among them. Livingston, Thompson, Van Ness, Platt, and Woodworth—here is an array of judicial names which of themselves give lustre to our judicial annals and renown to our state. Nor is their splendor essentially dimmed because Kent and Spencer—names which shine as stars of the first magnitude—stand in the same constellation.

On looking into that ample record which gives us the result of the labors of these distinguished jurists, it is impossible not to be struck with the vast scope and range, and the almost endless variety, of subjects, comprehended in a system of common law for such a people as ours. We find these judges dealing with almost every conceivable interest of man in the social state. Questions between government and people—questions of power on the one side and of rights on the other—questions of privilege, of duty, and of liberty—questions of personal security and personal inviolability—questions respecting property in every shape, real and personal and mixed, tangible and intangible—questions respecting the earth, and whatever is upon it,

or about it, or beneath it; respecting the water, and respecting the air—questions in regard to business in all its countless forms; in regard to contracts, and obligations, and liabilities—questions in regard to all the relations of civilized life, between husband and wife, parent and child, guardian and ward, principal and agent, master and servant, citizen and citizen—questions in relation to education, in relation to charity, in relation to religion; and, indeed, it were endless to attempt to enumerate the subjects and questions of interest, which, with all their incidents and accessories, we find to have been passed in solemn review, and for solemn adjudication, before that august tribunal whose doings and declarations are read in the record to which I have referred. This reference to the extraordinary show of subjects and cases in these volumes is made, not as being peculiar to these reports above all others, but as calculated to give us some faint idea of what a vast and comprehensive system that is with which our common law judges undertake to deal. Their duty is always one of a most difficult and delicate nature—of a nature to task the highest intellectual powers, and demanding the perpetual exercise of moral qualities almost above the attributes of humanity. Their office is one which, in its operation, comes home more nearly to the bosoms—the interests, affections and feelings—of men, and one too of higher essential dignity, than any other which it falls to the lot of mortals to engage in, in the whole range of official

or public employment. A portion, and a very large portion, of that justice which it belongs to God alone to dispense with exact and unerring equity, is committed to them to administer; and what renders the case to my mind vastly more striking and solemn is, that they are called to dispense justice under a law, the great body of which is unwritten—as unwritten it will for ever, in a great measure, remain, write it out in digested codes as often as we will—a law which has something else, and something deeper in it, than definitions and abstract rules; which floats around every man's person, and over the community, as the air does, and may be felt though it can not be seen; and which, having its ultimate sanction in the law of nature and the law of God, looks sometimes, of necessity, for its primary interpretation, alone to the bosom of the judge. And in this connection—though it seem like a digression—I hope I may be allowed to say, that the office of attorney and counsellor of such a court of justice, is one which, in importance and dignity, stands next to that of the judge. The Bar is inseparable from the Bench in the administration of justice, and their character and standing are also inseparable. Both must be learned, able and pure, or neither will be. They act and react on each other; and next to the solicitude which the community may feel, and the provisions they may make, for maintaining an independent, sound, able and dignified Judiciary, should be their anxiety and their measures, for keeping the charac-

ter of the Bar up to a corresponding elevation. As sure as we live—as sure as nature works by unerring laws—the Judiciary and the Bar, in any country, will stand, in the long run, on nearly the same level, however exalted or however low.

The judges of our Supreme Court from 1804 to 1823, had, as I have faintly shown already, a work of higher character, and greater difficulty and delicacy to perform, than commonly falls to the judiciary. It was their task to domesticate the common law, and bring it home to the community, in a manner not done before; to give its great principles and its great truths, in many respects, a new application, and to construct a system of jurisprudence, which, though English in its origin, should here become strictly American. And, in doing all this, they were to make up such a record of their work, with the results of their profound study, research and reflection, that it should remain, with the stamp both of authority and of perpetuity upon it, for the instruction and guidance, not of their successors only, but of the state, and of the whole country. How well and faithfully this great work was performed, on the whole, is too well understood in and out of the profession, to need that I should insist on it here. I am fully warranted, I believe, in saying that the reports of their adjudications are more quoted and more relied on as authority, not only here at home, but in the courts of the several states, and of the United States, than any other originating in this country. And this is not all. They not

only gave the law, to a considerable extent, to the states of this confederacy, but instances are not wanting in which it was sent back to the country from which its principles had been derived, expounded for use, and so received and applied. The reports of their decisions were quoted with respect and approbation, in Westminster Hall.

In the construction of that system of American jurisprudence of which we have the record mainly in Johnson's Reports, I shall deem it not unjust, or disparaging to their able associates, to say, that Kent and Spencer had the principal share. These great men prosecuted their labors together from 1804 to 1814. During this period, each brought in his contributions, in full measure, and in full proportion, according to his particular line of ability. And this certainly must be said for Judge Kent, that, having been six years on the Bench when Judge Spencer took his seat there, the first substantial course in the foundations of the new jurisprudence—for so I think it is entitled to be called —was laid by his hand. From 1814 to 1823, the mark of strong preëminence among the judges of the period, rested individually on Judge Spencer. Still, however, during all this latter period, though they held their sway in separate tribunals, their peculiar powers were frequently brought into exercise in the same causes and questions, through the part they each had in the business of the court of last resort. And in referring, as I am now about to do, to a few of the judicial opinions delivered by

Judge Spencer, we shall necessarily meet with cases in which the distinguishing characteristics of these two eminent jurists were exhibited, and shall be led to notice in what way the peculiar force of each was displayed, and in what the superior merit of each consisted. In this reference to adjudged cases, I must necessarily confine myself to the notice of a very few only, and these taken almost at random, and merely by way of example, to show, in some faint manner, what Judge Spencer's way of handling causes was, and how he was accustomed to deal with legal questions, whether old or new; feeling perfectly sensible, at the same time, that no adequate notion whatever, of what he really accomplished for the jurisprudence of his country, can be obtained from this, or any other selection of cases; and that nothing short of an intelligent and discriminating progress through the whole record of his judicial labors could suffice to show us the full measure of the progress which the law made under his forming hand.

In the first month of his judicial service, a question was presented in the Court for the Correction of Errors, upon an appeal from chancery,[1] whether the equity of redemption of a mortgage was an interest in lands which could be sold on an execution at law. At that day, this was deemed a question not free from difficulty. Lands and real estate here were chargeable with debts by statute, and liable to be seized on execution, contrary to the partial

[1] Waters et al. vs. Stewart, 1 Caines' Cases in Error, 47.

exemption they enjoyed in England, by the policy of their law. But the difficulty lay in the technical rule which had prevailed at law, that the mortgagee had the fee, and was the legal owner, and that the mortgagor in possession was only a tenant at will, without any immediate legal interest in the land. Judge Spencer delivered an opinion in which, along with Judge Kent, he went for having the court break away from a rule so artificial and inequitable, so at variance with the substantial truth of the case, and so inconvenient if applied to the state of things here, where a large part of the lands were, at the time, under mortgage to loan officers or others. He held that an equity of redemption should be deemed at law, an interest in lands, and liable to be sold as "real estate," under the statute. And such was the decision in the case.

In the same year (1804,) a case[1] came before the Supreme Court, which arose upon a contract to sell and deliver flour, and to receive in payment from the buyer, a note held by him and made by a third person. When the buyer came to demand the flour and tender the note in payment, the maker of the note had become insolvent, and the seller refused to deliver the flour. Hamilton was counsel for the buyer, and Harrison for the other party; and they appear to have argued and rested the case altogether upon the question whether the contract or promise of the seller was not wholly void for want of a sufficient consideration. Judge Spencer in his opinion,

[1] Roger vs. Merritt et al., 2 Caines' Rep., 117.

deciding the case, took a new position, and, admitting the contract to have been well made, he yet held, that it was a contract in its nature executory, and that before or at the period when it was to be carried into execution, the consideration agreed to be given by the buyer had wholly failed by reason of the insolvency of the maker of the note; and that the tender of the note of a bankrupt was no payment, or offer of payment. This he said would be highly inequitable.

In another case[1] which arose shortly afterwards, Judge Spencer delivered an opinion in favor of sustaining an action of debt at common law, brought in this state, upon a decree of the Court of Chancery in New Jersey—the decree being simply for the payment of a sum certain, without any acts to be done on the part of the party to whom the money was to be paid. The court so decided. This was a new point, and had never before been judicially passed upon. Lord Ellenborough afterwards held substantially the same doctrine, in England.[2] Judge Spencer's opinion in this case, is marked by that clearness, admirable precision, and strong logic, for which he was so remarkable. The Chief Justice, Kent, dissented.

In 1806, a suit[3] was brought in this state for alimony by a wife, on the basis of a decree for a divorce obtained by her against her husband in the

[1] Post et al. vs. Neaffie, 3 John. Cases, 22.

[2] Sadler vs. Robins, 1 Camp., 253.

[3] Jackson vs. Jackson, 1 Johns. Rep., 424.

state of Vermont. The parties had been married in this state, where they resided, and where the husband still resided while the wife took up her temporary abode in Vermont with a view to the divorce. Having obtained her divorce, she returned to reside here; and she had procured the decree abroad for a cause which by the policy of the law in this state was not a sufficient ground of divorce. A very able and admirable argument was made at Bar against the validity of the divorce in this state, and against the action brought by the wife, by a member of the Bar of this city, and still living amongst us, though now for some years withdrawn from professional employment.[1] Judge Spencer delivered the opinion of the court against the action. In three short paragraphs he disposes of the whole case on its merits. A single brief principle in ethics cuts up the action. "Here is a plain attempt by one of our citizens," says he, "to evade the force of our laws." "It would be attended with pernicious consequences to aid this attempt to elude them." "Wherever an act is done *in fraudem legis*, it cannot be the basis of a suit in the courts of the country whose laws are attempted to be infringed."

In 1808, a case upon one of those political libels, so very common in the early history of parties in this state, was brought before the court. It was the case of Tillotson vs. Cheetham.[2] The opinion of the court was delivered by Chief Justice Kent,

[1] Harmanus Bleecker, Esq

[2] 3 John. Rep., 56.

and Judge Spencer delivered a dissenting opinion. The libel complained of, taking the *inuendos* to be true, had charged Mr. Tillotson, then Secretary of State, with bribery and corruption in reference to the incorporation of the Merchants' Bank of New York by the Legislature. The publication was made on the 17th of July, in Cheetham's newspaper. The same newspaper fourteen days before had made the same charge; and Mr. Tillotson brought a separate suit for each publication—commencing both suits after the last publication; at least so it was presumed because the contrary was not alleged. He prosecuted his suit for the first publication to judgment and recovered fourteen hundred dollars. In the other (the case we are considering,) judgment was obtained by default, and upon an inquest for the damages, the former verdict was offered in evidence in mitigation of damages, and rejected; whereupon Cheetham had another verdict against him substantially for the same libel, and was mulct in eight hundred dollars more. Judge Spencer was for relieving from this latter verdict, and he proceeded upon a plain, practical rule of the common law, which is equally a rule of natural justice; namely, that a man is not to be punished twice for the same offence, or what is substantially such; and as, in this case, a part of the damages in both verdicts was clearly vindictive, and by way of punishment, relief ought to be granted. The point was forcibly put, and admirably, and to my mind, conclusively reasoned, after his

own brief and comprehensive, yet rigid manner; and he insisted that there was no rule, not even a technical one, to forbid the reception of the evidence offered in mitigation of damages. A majority of the judges, however, decided otherwise, upon an opinion which I think it must be conceded by any one who will examine it critically, missed the true point on which the question turned. If this decision has ever been held as authority in any subsequent case, it has escaped my observation.

There are several other cases of great interest in which Judge Spencer dissented from the rule of law as laid down by a majority of the judges, and where the rule has been acquiesced in and become established law. And I must be allowed to say, that I think it impossible, even at this day, long accustomed as we have been to look upon the rule as undisputed law, to read some of these cases without something very like a conviction arising in the mind, that the right of the case, as well as the true principle to have been established, is found in the opinion of the dissenting judge. It is impossible not to feel that the character of the law, as founded in natural justice, and having eternal principles of truth and right to stand on, would have been better maintained and vindicated if his views had prevailed. Such, it seems to me, is the clear, precise and admirable rule of damages which he laid down and desired to have adopted in an action on a covenant in a deed for quiet enjoyment,[1] where there was a

[1] Pitcher vs. Livingston, 4 John. Rep., 1.

failure of title to lands, and the purchaser was evicted and turned off, after having made beneficial improvements on the premises. He would make the seller pay for such improvements, and not let him off merely with paying back the consideration money and interest. Nothing less than this was the actual loss of the purchaser by the breach of the covenant, and for so much the seller undertook to be responsible. The covenant was broken when the eviction took place, and by all the analogies of the law that was the time in reference to which the damages should be ascertained and computed. The court, however, established a different rule.

In another case of this sort, a question arose upon the novel condition of lands in this country, as covered with our primeval forests. A tenant takes possession of such lands on a lease for life, and under a covenant not to commit waste.[1] What should constitute waste in such a case, so as to work a forfeiture, could not be determined by the English doctrine of waste. The case required a new rule. Cutting off timber to bring the lands into cultivation, could not, in this country, and in such a case, be waste — but how far might this be carried before it should become waste? Judge Spencer held that, as no fixed and definite rule could be laid down, a forfeiture of the lands ought not to be incurred on the vague question of more or less. He would not, therefore, sustain an action of ejectment on the

[1] Jackson vs. Brownson, 7 John. Rep., 227.

allegation of waste, by clearing off more of the forest from agricultural lands than might be deemed judicious or proper. The landlord on such an allegation might sue on his covenant, and should recover such damages as he could prove, for the injury to the inheritance, if any. The court, however, maintened a different doctrine, and held that in every case of this sort, waste should be deemed to have been committed, to work a forfeiture of the lands, whenever a jury could be found to say that in their judgment *too much* of the forest had been cleared away, and *too little* woodland left for the use of the farm. This is manifestly the substance and effect of their decision.

A case reported in the 2d volume of Johnson,[1] in which the opinion of the court was delivered by Judge Spencer, may be referred to as one out of a great many, where an important principle has been established, in regard to which, as the learned judge remarked, in this case, "the books afforded very little information." The case now alluded to was the first that decided that emuneration of *quantity* in a bond or deed accompanied by any description of the land — not metes and bounds only — from which the quantity can be certainly ascertained, shall not be held to impart a covenant as to the actual quantity. As usual with him, the opinion is short, but carries conviction and authority along with it. This has become the settled doctrine of our courts.

[1] Mann & Toles vs. Pearson, 2 John. Rep., 37.

In 1809, there arose a controversy in this city, involving persons of the highest respectability, stirring up political parties to great excitement, bringing the jurisdiction of the chancellor and that of a judge of the Supreme Court into conflict, and giving occupation, not always, it is to be feared, very calm or very candid, to our highest judicatures for the space of some two years. I allude to the controversy, or rather the controversies, which arose upon the commitment of Mr. John Van Ness Yates for a contempt, by the chancellor of the state.[1] We are now too remote from the time of the transaction, to be in any danger of reviving the excitements of the period by a reference to the case—at least where such reference is made for a harmless purpose, strictly appropriate to the general objects of this discourse. Judge Spencer was a prominent actor in the case. Mr. Van Ness was brought before him on a habeas corpus, with the cause of his commitment, and was by him discharged from custody. The chancellor recommitted him. He was again discharged by the judge. The chancellor committed him again to custody. He was then brought before the Supreme Court, when a majority of the judges decided to leave him in the hands of the chancellor. The Court of Errors, however, reversed their decision, and set the prisoner free. I shall not utter a word on the merits of the controversy, or of the various judicial opinions which were pronounced

[1] Case of J. V. N. Yates, 4 John. Rep., 317, and vide also 6 ibid, 337; 5 ibid, 282; and 9 ibid, 396.

in reference to it. It is enough to say, that never on any occasion, perhaps, in this state, were the learning and ability both of the bar and of the judiciary more fully called forth and displayed; and that Judge Spencer, in the part he bore in the discussions, and in the defence of his positions, was not a whit behind the best and foremost of them all. I will only add in reference to this great case — and this has been the main object I have had in introducing it — that it led eventually, after sufficient time had been given for the subsidence of the passions it had aroused, to an important amendment of the statute in relation to the habeas corpus, and to proceedings under it. In 1818, an act was passed by the Legislature on this subject, which was drawn, or mainly prepared by Judge Spencer, and the substance of which has since been adopted into the Revised Statutes. It is sufficient to say of this enactment, that it makes the duty of the officer or court granting a habeas corpus, where there has been a commitment for contempt, perfectly plain, and goes far to give a legislative sanction to the course and action of Judge Spencer in the case of Mr. Van Ness. He had held that he had the power, and that it was his indispensable duty, to enquire and determine, under the law as it then stood, whether the chancellor had authority to commit for contempt, looking at that contempt as it was charged in the commitment, and having believed he had not, he had discharged Mr. Van Ness. Under the law as it now stands, such would be precisely the

power and duty of an officer in the like case, and if a prisoner were once discharged in such a case, his recommitment for the same cause, charged over again in the same way, would now subject the judge making the commitment to the payment of heavy damages, and to indictment for a misdemeanor.

A doctrine was decided in a case in the 13 Johnson (page 174),[1] upon Judge Spencer's opinion, which is of no little interest and importance. The case was submitted without argument; and it was held by the court, that when the holder of a note is requested by one who has signed it as surety, to proceed without delay against the principal for the collection of the money, the principal being then solvent, and the holder refuses or neglects to do so, and the principal afterwards becomes insolvent, the surety will be exonerated from all liability. This doctrine has been questioned in the Court of Chancery, but it has not been overthrown. Judge Spencer reaffirmed it, in a case in the Court of Errors, and where his opinion prevailed.[2]

In a case which came before the Supreme Court in 1817,[3] that court decided that it had jurisdiction of a marine trespass, which necessarily involved the question of prize or no prize—a question exclusively of admiralty jurisdiction. Judge Spencer delivered a dissenting opinion, which was after-

[1] Pain vs. Packard.

[2] King vs. Baldwin, 17 John. Rep., 384.

[3] Hallett vs. Novion, 14 John. Rep., 273.

wards sustained by the unanimous judgment of the Court of Errors.[1] Chancellor Kent delivered an able and elaborate opinion in the Court of Errors in this case, and in an argument full of legal learning, and occupying twenty pages of the reports—*cæca regens vestigia filo*—he found the same conclusion that Judge Spencer had reached, in an opinion occupying less than three pages, and based both upon principle and authority.

Another case came up, a year later, which exhibits these two remarkable men to us, in connection and contrast, still more strongly, and each in the pride and full show of his own great, and almost unrivalled powers. It was the case of Griswold vs. Haddington,[2] every way one of exceeding interest, and especially as presenting a new and very difficult question under the law of nations, respecting the effect upon a commercial partnership between persons who are citizens and residents of two different countries, by the breaking out of a war between those countries. Judge Spencer gave an opinion—with which the court agreed—that the war produced a suspension, or, *ipso facto*, a dissolution of the partnership previously existing, so that the one partner was not responsible upon a contract, express or implied, made by the other. In pronouncing this opinion, he said that his proposition was not supported, nor denied, by any judicial decisions or elementary writer of the common law; but it was

[1] Same case, 16 ibid, 327.

[2] 15 John. Rep., 57, and 16 ibid, 438.

supported by the strongest reasons, and by necessary analogy with adjudged cases. The opinion is comprised in about four pages of the volume where it is found, and it would be hard to find in the whole range of our judicial records, a more clear, comprehensive, condensed, well-reasoned, and conclusive opinion. John Marshall, Theophilus Parsons, and Ambrose Spencer, were, I think, the only judges of their time, in this country, who prepared and delivered such opinions as this. This case was carried to the Court of Errors, where this opinion was sustained, only two senators dissenting. On this occasion Chancellor Kent delivered perhaps the most elaborate essay on the law of the case, ever prepared by him, in the form of an opinion, in the whole of his judicial life. It occupies upwards of fifty pages in the reports. It would seem as if the libraries of the world had been laid under contribution to supply materials for the work. All known codes and systems, in all languages, had been explored, and vouched as authority. It is written in that flowing and attractive style, and has all that unction of full scholarship, for which the works of the distinguished author are so remarkable. It deserves to be read and reread by the student; and if, when he has made himself master of this admirable production, he will turn back again to the brief view of the case taken by Judge Spencer, on the same side, he will be surprised, perhaps, to observe, how completely, just in a few compact sentences, with the aid of one or two undeniable principles, and one or

two strong analogies, he had embraced, developed and settled the whole merits of the case.

As an example of the great ability with which he handled important questions of constitutional law, I may refer to a case in the 17th Johnson—The United States vs. Lathrop.[1] In that case, he briefly discusses the question whether a state court can have jurisdiction of criminal offences committed against the United States, or of cases arising under their penal laws, and he delivers the opinion of the court against such jurisdiction.

If Judge Spencer was a great common law lawyer—and his fame as such will grow and widen with an expanding country, and with revolving time—we must not omit to notice also with what readiness and ease he seized, mastered, and applied the great principles of equity, whenever it became his duty, as it often did, in the Court of Errors, to grapple with cases coming up from chancery. I must be allowed to refer, which I shall do in a very general way, to two or three of these cases.

One of these cases—that of McIntyre vs. Mancius (16 John. Rep., 592), involved the determination of an exceedingly important question of equity law, in reference to the general administration of justice. A bill of discovery was filed in aid of a party in a suit at law. It was alleged that one of the two plaintiffs in the suit at law, which was on a promissory note, had been made a party by collusion, to prevent his testifying in behalf of the party

[1] 17 John. Rep., 4.

sued, for whom he was a material witness to prove facts which would be fatal to a recovery; and it was demanded by the bill that they should disclose whether such was not the truth of the case. The chancellor had decided against the right to compel such a disclosure. Judge Spencer, proceeding "upon general principles, and analogies drawn from adjudged cases," pronounced a very lucid and well-digested opinion in favor of the right, and for reversing the decree of the chancellor. The Court of Errors reversed the decree, one senator only dissenting.

In another case—Jacques vs. Methodist Episcopal Church (17 John. Rep., 548)—a subject of the deepest interest was presented for consideration. It involved a question in regard to the extent of control which a married woman should be allowed to exercise over her separate estate, secured to her by ante-nuptial contract; she having chosen in this case, without the intervention or intermeddling of her trustee, to treat her husband, in respect to her estate, and its employment for their mutual comfort and happiness, with the confidence and liberality due to so intimate and tender a relation. The chancellor had taken a view of the matter adverse to the right which the wife had chosen to exercise. Chief Justice Spencer in the Court of Errors—professing, as he always did, and with perfect sincerity, the most unfeigned respect for his eminent friend and brother—was constrained to take a different view of the case, which he presented in an opinion

of great moral force and beauty, as well as of great legal power. The court reversed the decision of the chancellor by the votes of all the members except three. This case brought under consideration the comparative value, and the relative moral influence, of the rules of the civil law, and of the common law respectively, in reference to the conjugal relation; and I know of no more salutary or solemn lesson and warning on this subject, to the political philosophers of this age, than may be read in a few brief but pregnant sentences in the opinion delivered by Chief Justice Spencer in this case; and also in another opinion delivered on the same occasion by the sound and pure-minded Judge Platt. Generally speaking," said the chief justice, "the rules of the common law, which give to the husband all the wife's personal property, and the rents and profits of her real estate, during coverture, are better calculated, in my judgment, to secure domestic tranquility and happiness, than settlements securing to the wife a property separate from and independent of the control of the husband. An improvident and dissipated husband may squander his wife's property, and reduce both of them to poverty and distress. On the other hand, the possession, by the wife, of property independent of and beyond the control of the husband, would be likely to produce feuds and contention. Marriage is a union of persons and interests, *pro bono et malo*, and the ancient provisions of the common law show forth, in our own country, decisive proofs of its benign and salu-

tary influence." "I confess," says Judge Platt, "that I love and venerate the primeval notion of that mystical and hallowed union of husband and wife, when 'they twain became one flesh.' Marriage, in that old fashioned sense, is the purest source of domestic joys, and the firm foundation of domestic order."

The case of Anderson vs. Roberts (18 John. Rep., 515), presented a new question on the statute of frauds. Chancellor Kent had held that under that section of the statute which was made to protect creditors from fraudulent conveyances by their debtors, a purchaser in good faith, and for a valuable consideration, from a fraudulent grantee, would not be protected against the creditors of the grantor; though he admitted that, under that section which was made to protect *bona fide* purchasers against fraudulent purchasers, or voluntary grantees, a different rule prevailed, and that a purchaser for a valuable consideration, without notice, from a fraudulent grantee, would be protected against a subsequent purchaser, for a valuable consideration, and without notice, from a fraudulent grantor, Chief Justice Spencer resisted this notion of a different rule in the two cases, in a very able opinion, in which he was sustained by Judge Platt, and the whole court. The decision of the chancellor on this point was thus unanimously reversed; and this decision has ever since remained one of the prominent land-marks of the law.

The case of Slee vs. Bloom and others (19 John.

Rep., 456), presented a new and very interesting question respecting the liability to creditors of individual members of a manufacturing company which preserved a nominal existence, but in reality had lost its vitality. The chancellor adhered to a strict technical rule, requiring a judicial dissolution of the company before the responsibility of its members should arise. Chief Justice Spencer, in the Court of Errors, delivered an able opinion, to the effect, that there might be a surrender *in pais* of corporate franchises; and that the suffering of acts to be done which destroyed the end and object of the corporation was equivalent to a direct surrender—at least, so far as creditors were concerned. It is impossible not to be struck with the broad and comprehensive justice of this opinion. It was concurred in by the whole court, with the exception of a single senator.

Perhaps there was nothing in which the clear perceptions and legal mind of Chief Justice Spencer were more strikingly displayed than in difficult questions arising upon the construction of statutes. An example may be found in a case in the 20 Johnson (659)—that of Wendell vs. Wadsworth. The question was on a statute providing for a deposit of deeds and conveyances of military bounty lands; and his opinion in the case, in the Court of Errors, adverse to the construction given to the statute by the chancellor, is worth an attentive perusal. The decision of the chancellor was unanimously reversed.

It may well be supposed, that when the Chancel-

lor and the Chief Justice concurred in any rule or principle of law—and when they differed it was a comparatively rare exception to the general fact—such rule or principle was quite likely to be established and to stand the test of time. The case of Coddington vs. Bay (20 John. Rep., 637), presented a new and important question in commercial law. An agent having notes of his principal in his hands, improperly and without authority of the true owner, transferred them to an innocent party, who, though not a creditor, was a surety for him, and took the notes by way of securing himself against his liabilities. The chancellor decided that the party thus receiving the notes could not hold them against the true owner, inasmuch as they had not been received in the usual course of trade, nor for a present consideration. The Chief Justice upheld and defended this rule and doctrine in a very strong argument and opinion, in the Court of Errors, and it was sustained by a large majority of the court. The rule has remained unshaken to this day.

In closing this imperfect—and I must add, to myself very unsatisfactory—examination of adjudged cases, which I have thought it my duty to make and present, it is due to the judicial reputation of the Chief Justice to refer to the celebrated case of Livingston & Fulton vs. Van Ingen (9 John. Rep., 507), in which the Court of Errors made a decision—perhaps the most palpably erroneous ever made by that court—establishing the constitutionality of our state laws granting exclusive

privileges to the plaintiffs to navigate the Hudson river by steam, in the face of the laws of the United States regulating the coasting trade. And I make this reference merely for the purpose of saying that Judge Spencer, being related to some of the parties concerned, gave no opinion in that case, and there is no evidence, and it is not believed, that he approved of that decision. The decision in the subsequent case of Gibbons vs. Ogden (17 John. Rep., 488), was a mere iteration of that in the other case, and in obedience to its authority.

And here I close the particular memoir, which I have proposed to myself to present, of the judicial life of Chief Justice Spencer. To say nothing of what must be set down to the unskilful execution of the task — of which nobody can be more sensible than I am — every lawyer, at least, will understand how very far short of success any one must of necessity fall, when he is put to the task of exhibiting the results and issues of the labor of a great judicial mind through a period of nineteen years—labors tending to the formation of a systematic creation and structure — of an ample and comprehensive code of jurisprudence — which, to have any just or intelligent notion of it, must be seen as a whole, must be seen in its outlines and grand proportions, and in its beautiful harmonies; and when nothing better can be attempted than holding up to view a few detached and disjointed fragments — a section of a wall, a shaft of a column, or a carved capital, cut out of the building — by way of sample and

specimen. No just estimate can be put on the service rendered by Chief Justice Spencer to the jurisprudence of his country, by us or by any body, by the present or by coming generations, without some adequate acquaintance with the whole contents and body of that voluminous history in which his acts and labors are recorded. The circle of his true fame and glory, therefore, will be that of the Judiciary and the Bar, where only it can be expected that he should be fully known and understood in his works and character as a judge. Statesmen, however, and men of general intelligence, who must know something of the law and its general history, will never fail to hold him in high estimation. Amongst them, as in the legal profession, the name of Spencer, along with those of Holt, Hardwicke, Camden, Thurlow, Mansfield, Kenyon, Marshall, Parsons, Story and Kent, will continue, in all time, to be pronounced with respect and veneration, so long as the common law and free countries — free as no other system of jurisprudence can make a country — shall endure. Nor can his name, indeed, die out of the memories of men of all ranks and degrees — at least in this country — so long as that popular intelligence shall prevail which enables the common mind to comprehend, though only in a vague and general way, how our system of American common law, in the construction and elucidation of which he had so large a share, stands connected indissolubly with all the securities of person, property and happiness by which they are surround-

ed, and with that manly and virtuous freedom by which they are so much distinguished.

Ambrose Spencer was called a stern judge. He was as stern as Justice is, and not more so. Crime, fraud, vice, cruelty, injustice, oppression, violence, breach of faith, breach of honesty, and breach of law — these, as they appeared before him, never escaped the visitation of his just indignation and his stern rebuke. Ignorance and folly, if now and then he met such at the Bar, where he had a right to look for something better, were not apt to escape his frown of displeasure or of contempt. With a large frame, and a commanding person, tall, straight and well knit together, and with a countenance indicative of strong thought, not cold and abstract, but deepened with feeling not less strong — forming altogether a presence of uncommon dignity and energy — it certainly was not a light thing to encounter his displeasure. The character for stern justice and rigid impartiality which he bore was apt to make his displeasure felt as something only too well deserved, and it was the more justly to be dreaded from the uncommon command he had over the most forcible forms of expression which the English language could supply, and which seemed to possess extraordinary vigor and intenseness when he was dealing in rebuke. Many a culprit, I doubt not, has felt his crimes to be really enormous, for the first time, under his awful reproaches. But if he was a severe, he was also a just and humane judge. He had a great admiration for talent, as he

had for honesty, and goodness, and truth. He detected the indications of ability and merit at the bar among its junior members, as they presented themselves there, with that quick perception which was so characteristic of him in all things, and he was prompt to lend to all such his countenance and encouragement. There was, too, in him, behind an exterior sufficiently austere and rigid, a deep well-spring of natural affections, and amiable and benevolent dispositions; and never was the rock struck, on any just occasion, that the fountains did not flow. The tenderness of his nature was easily stirred, and was often stirred, and that, too, from uncommon depths. In his judicial capacity, however, it was the peculiar and commanding strength of his intellectual powers which chiefly made him a man of mark, and gave him his superiority. His mind was remarkable for the quickness of its perceptions, for its penetration, and its comprehensiveness; for the ease with which it would master the most complicated details, and bring order and light out of confusion and darkness. His mind was not of a nature to creep to a conclusion; he strode to it by the directest way, and by a kind of giant tread. No lurking fallacy in the statement, argument or opinion of another could well escape the detection of his keen and scrutinizing glance. If the logic of a thing was wrong, however plausible it might be, it seemed as certain to meet exposure from him, as if it was wrong in principle or in morals. His judicial opinions may well be taken as models in

that kind of composition; clear in statement, expressed in vigorous, yet unaffected language; presenting usually a single point, or view, on which the whole case must turn; the reasoning carried on with equal acuteness, precision and brevity, with a rigid exclusion of all matter not essentially belonging to the case, or the argument; quoting authorities sparingly, but with admirable discrimination; and when his conclusion is reached, stopping short, and leaving the principle developed and decided standing out in high relief from the case, as a fixed and permanent land-mark of the law. Such was Chief Justice Spencer. *Optimus, atque interpres legum sanctissimus.*

I can not allow myself to turn away from the volumes of Reports we have been led to consider, without adverting to the lofty morality and the sublime purity every where breathed through them. It is only common praise to say of judges that the ermine they have borne has remained unsullied. It is hardly any praise at all to say of them that they have not yielded to corruption. Woe to the country when only a secret apprehension shall begin to be felt that the integrity of its judges is assailable, or that the balance may fail to be held by them with an independent hand. Judges—like vestal virgins—must not only be innocent, but they must not be suspected. And I should as soon think of praising a woman because she was chaste, as I would of commending a judge because he had not been corrupted. It is not for this that I now advert

to these volumes of Reports. It is to the freshness, fulness and vigor of the whole moral tone they bear, so elevated, so lofty, so suited to men having their portion of that work of justice and judgment to perform, which is the proper attribute, and glory, of the Divinity himself—it is to this I refer as something not to be passed by unnoticed by us, on an occasion like the present. No where else, perhaps, on this earth, is humanity seen in a position and attitude so exalted, so raised and sustained above the common level of our nature, as on the judicial Bench, surrounded by and supporting the God-like attributes of goodness, wisdom, justice, mercy, truth and purity. And I must be permitted to say, that, so far as my reading and observation have gone, no court has ever maintained and displayed these cardinal attributes in higher perfection than that whose history is read in the volumes to which I have referred.

What remains of the life and services of Chief Justice Spencer, considering the length to which this narrative has already extended, must be briefly and rapidly sketched. It must be left to some other hand than mine—which I trust may not be wanting—to supply the full details and particulars of that portion of his history which connects itself with politics and the great affairs of state. Until this is done, it cannot be known how much this state and the whole country are indebted to him, for his long continued and disinterested efforts for

the promotion of their true interests—or what he believed to be such.

On his elevation to the Bench in 1804, and during his judicial service, he did not suffer the ardor of his interest in public affairs, and in the public questions of the day, to abate in the least degree. The strong friendship, personal and political, between himself and Mr. De Witt Clinton, which began about the year 1798, and which was strengthened by a family alliance in 1808, continued till 1812, when it first suffered an interruption—only, however, to be afterwards renewed with increased confidence and cordiality. From 1807, when Mr. Tompkins was first elected governor, till 1812, the administration of this state was chiefly in their hands. Gov. Tompkins owed his selection as a candidate, and his election, to them, or more properly, it is believed, to Judge Spencer; and it does not, I suppose, admit of a doubt, that the whole policy of the administration at that time, was shaped under their joint counsel. The period from 1812 to 1816, was that of the separation of the two friends; it included that of the war with England, and during that trying time, the political power and influence of Judge Spencer in this state were nearly supreme. From 1807—the year of the embargo—to the close of the war in 1815, the general government at Washington leaned for support on the arm of this great state. And during the war, particularly, the strength, firmness and energy of that support, were due to Judge Spencer, in a very great

degree. His services were understood and appreciated at the seat of the national government. And Mr. Madison was desirous of securing his more immediate coöperation, by calling him to Washington. He preferred his position here, both as being more agreeable to himself, and more useful to the country; and he proposed, and secured, the appointment of his friend, Gen. Armstrong, to be Secretary of War.

Mr. Clinton's support of Mr. Madison's administration had not always been cordial, though it was not till 1812, that he stood in open opposition. The friends of George Clinton, and no doubt his nephew among the number, had thought that he, and not Mr. Madison, should have been put in nomination to succeed Mr. Jefferson in the presidency; and before Mr. Madison's first term had expired, Mr. De Witt Clinton was himself a candidate to displace and succeed him. In April, 1812, he was put in nomination at Albany. Judge Spencer acquiesced at the time, though he was far from giving this step his approval. In June, however, the condition of things was essentially changed, by a declaration of war against England — a war which he approved, and was at once resolved to support with all his energies, and on the success of which he believed the honor and the best interests of his country hung. He did not think it wise or patriotic, especially in those who professed to approve of the measure of the war, commenced as it was under Mr. Madison, to seek, at so critical a moment, in our relations

with a powerful enemy, to change the administration. He joined in an effort to induce Mr. Clinton to withdraw from the contest — but in vain. Mr. Clinton saw his duty differently in that regard, as also in another hardly less important. He placed himself in opposition to the state administration, so far at least as to oppose the reëlection of Gov. Tompkins in 1813. And here again, Judge Spencer thought it unwise and unsafe to make or allow any change. Gov. Tompkins, with his manly counsel—and without disparagement to the governor, it must be added, under his lead — was carrying New York steadily along in support of the war and of the general government. And it is not too much to say, that the coöperation and aid of this state, especially in recruiting both the forces and the finances of that government for the war, at a crisis in that eventful time, saved it from being utterly overwhelmed. Mr. Clinton's opposition at such a time roused the feelings of Judge Spencer to the height of an undissembled indignation. He was not a man for half-way measures. He could not serve two masters. He was too ardent in temperament, too thoroughly inflamed, and too sure of being right himself, to make, perhaps, allowance enough for the differing views and policy of Mr. Clinton, or to enable him to find, at the moment, any thing to excuse, much less to justify the course that gentleman was pursuing. It was doubtless the most painful act of his life; but he did not hesitate, and the separation from his friend was for the time complete — and

never was there a clearer sacrifice, or a more painful one, to principle and to duty.

It is due to the truth of this painful history to state, that a difference somewhat serious, had arisen between these distinguished and patriotic men, previous to the events to which I have here referred. They differed in regard to the personal action and bearing required from men in their position, so conspicuous and so commanding, in reference to the monstrous corruption unblushingly practised at the period for securing the incorporation of a mammoth bank by the Legislature in the early winter of 1812. Mr. Clinton declared himself opposed to granting the charter of the Bank of America, as proposed and asked for; but as the project was mainly in the hands of persons professing, with him, the republican faith, he could not bring himself to make his opposition in any way offensive or personal to them. Judge Spencer, on the other hand, would hold no measures with those, who, for an object even the most worthy and unexceptionable in itself—and this was far from being such an object—were using means for success which struck at public virtue, and aimed even to corrupt it in the highest sources of power. He took his stand in opposition, with open and loud denunciations, fearless of all consequences. Consistency, too, as well as principle demanded this course from him. It was not the first time he had made war on this sort of corruption. On the incorporation of the Merchants' Bank of New York, in 1805, he had protested against it in

the Council of Revision, and published his protest, with a startling demonstration of the fact that the charter had actually passed the Senate by clear bribery—and he named the member by whose corrupt vote the bill had been carried. After this, it was impossible he should sit quietly by, while another and still more appalling corruption was in full play and practice before his eyes. This measure of monopoly and abomination—the chartering of a six million bank—was carried through the Assembly, and it became certain it would pass the Senate, if allowed to come to the vote. He applied to Gov. Tompkins, in this exigency, to employ a power found in the Constitution of 1777, and prorogue the Legislature. Nothing in any American constitution so smacked of prerogative and royalty as this power. Amiable, but cautious and hesitating, not to say timid—a politician, yet a patriotic one—sensibly alive to whatever might affect his personal popularity, which constituted the stock of his political capital—it is certain that nothing short of the infusion into him of a good share of Judge Spencer's own boldness and dauntless courage, could have brought Gov. Tompkins to adopt such a measure as this. It was adopted; and the character of the Legislature and of the state was, for the time, saved and vindicated. It was in reference to this movement for a mammoth bank, and the strong measure to defeat it, proposed and carried by Judge Spencer, that the first serious misunderstanding arose between him and Mr. Clinton.

It is gratifying to know that the separation of these excellent friends, each in his way sincere and patriotic, lasted no longer than the duration of the particular causes which produced it. While the war with England continued, a reconciliation seemed impossible. At an early day after that war was over, they were brought together, and again joined hearts and hands, as well in personal friendship, as in acts and measures to advance the glory of the state, and of the country. From that hour, their union was close and perfectly harmonious, strengthened daily by time and intimate communion, and was only dissolved by the death of Mr. Clinton.

In 1809, Judge Spencer and Mr. Peter J. Monroe, having been appointed by the governor, under a resolution of the Legislature, commissioners for the purpose, made a report, manifestly drawn up by Judge Spencer, proposing some important reforms and alterations in the chancery system of this state. It recommended that the number of chancellors should be three, each having an equity district, and the whole to constitute a Court of Review. This, the report said, would bring this very important court nearer the people, which in itself was desirable, and would, it was thought, relieve it from the pressure with which the chancellor of that day was already overwhelmed. An early change of this sort in the constitution of that court would probably have saved it from the doom that has finally overtaken it. The report is an admirable paper, and is

worth recurring to and perusing for the clearness and sagacity by which it is characterized.

The Constitution of 1821, was framed to sweep the civil offices of the state, and the Chief Justice ceased to hold his exalted station in February, 1823. He was then in his fifty-eighth year, and had nearly twenty-five years of health and mental vigor still left in him. He was a member of the Convention of 1821, from the county of Albany, as was also his friend Chancellor Kent. But while these gentlemen, and others like them, were personally held in great respect, it was not the policy of the majority to allow them to hold positions which would give them much practical influence over the deliberations of that body. Judge Spencer, while he remained in the Convention, was assiduous in the performance of all his duties; and occasions were not wanting when he raised the voice of wisdom and of solemn warning in that assembly, and with marked effect. His judicial duties called him away from the Convention before the close of its labors, and his name was not signed to the Constitution. It is believed it would not have been, had he been present.

Shortly after the close of his judicial service, having occupied himself for a limited time only at the Bar, he removed on to a farm in the neighborhood of this city, and became deeply interested in agricultural studies and pursuits. Previous to this, his fellow-citizens of Albany had the gratification of seeing him preside, for one year, with the impressive dignity, efficiency and energy so insepara-

ble from his nature and character, over the councils of this ancient city.

In 1825, the term of service of Rufus King in the Senate of the United States, being about to expire, and he having made known his intention then to retire from that high station, the enlightened public sentiment of the time pointed with great unanimity to Judge Spencer as the most suitable successor to that distinguished man. His age, his eminence, his commanding abilities, his sobriety and dignity, both of mind and demeanor, his elevation above the petty scheming and machinations of the mere politician, and the full maturity of his powers and accomplishments as a jurist and statesman, seemed to distinguish and designate him, above almost any man of the time, as eminently fit to hold a place in that august body, the Senate of the United States—than which there is not, and there never has been another, on this earth, of higher political dignity and power. On the day appointed by law for the election, he was nominated in the Assembly by a strong majority. In the Senate an extraordinary scene was presented. A majority of the members of that body held political sentiments at variance with those which he entertained. Still it was a duty expressly laid upon the Senate by statute, to nominate—if not him, then some one else acceptable to the majority. But it was rendered certain in that case that he would be elected on joint ballot; and senators determined therefore to defeat at once both the law and his election, by preventing any

nomination in that body. This was effected by the simple process of each senator in the opposition, taking a different candidate from every other senator. Twenty-one senators gravely proceeded to vote for twenty-one different candidates. The measure was of course successful, and the office of senator in Congress remained for the time vacant.

Judge Spencer was a member of the twenty-first Congress, from the Albany district, having taken his seat in December, 1829. He took no active, at least no leading part, in the movements of political parties, but he entered with characteristic zeal into some public questions fitted to occupy the thoughts and engage the abilities of such a man. Having the business of the committee on agriculture in charge he exerted himself to give that committee some more practical importance than had usually been assigned to it. He procured important resolutions to be adopted by the House, contemplating improvements in the cultivation of the sugar cane, and the fabrication and refinement of sugar. He also carried a measure, against very strenuous opposition, for diffusing valuable information among his countrymen, in regard to the cultivation of silk. In the prosecution of the impeachment of Judge Peck before the Senate, he was one of the managers on the part of the House, and delivered a very able speech. But the subject which engaged his most earnest attention, was that relating to the removal of the Cherokee Indians. His instinctive love of justice, his abhorrence of deceit, oppression, violence

and fraud, and the shock he felt at the manner in which the opinions and judgment of that high tribunal over which Marshall presided, had been contemned in the case of these Indians, led him to enter into this subject with even unwonted zeal and energy. He addressed the House at much length on the subject, and, in every way, in concert with the ablest and purest men of the time, in and out of Congress, endeavored to arrest and stay the cruel hand, and unwarrantable course of the government. These efforts, as we know, were unsuccessful.

In 1839, Judge Spencer removed to a quiet and pleasant home in the village of Lyons, in this state, where he continued to reside till his death. He was, the same year, solicited to represent the seventh senatorial district in the Legislature, and a nomination was tendered him. This he declined. He had gone to Lyons for retirement. He still possessed all his powers and faculties in full vigor. But he had had his part in the serious business of the world, and what he wanted now, was a quiet life for the few years that remained to him; a place from which he could look out, and look back, on the busy world, which he would still regard with interest, yet without mixing himself up with its contentions and excitements; a place where he might contemplate the past, and solemnly prepare for the future. It did not belong to his nature to sit down in listless ease, or in moody or vacant abstraction. He interested himself in horticulture, having a spacious garden and grounds for his experiments and im-

provements. And nothing which concerned the welfare, or interested the hearts, of the little community where he dwelt, escaped his attention or his care. He was a fountain of knowledge and of wisdom to them, and he entered with affectionate solicitude into whatever concerned them, which they chose to bring to his notice. Nor did he refuse to let his opinions be known on the important public questions of the day; and his opinions were just as hearty and decided now, as they had always been, and were expressed with his accustomed directness and vigor, yet without asperity. Occasionally, too, he gave the public the benefit of his written sentiments. When, a few years ago, the subject of a registry law to preserve the purity of our elections was agitated, with much difference of opinion, before the Legislature, he prepared and published an article to demonstrate, that so far from such a law being unconstitutional, as had been insisted, it was directly and explicitly contemplated and required by the Constitution of 1821. The article was judicial in its character, and carried truth and conviction along with it. The last effort of this sort, and the last public act of his life, was a letter to his fellow-citizens, published, with his name, just before the election of 1846, when the new constitution was to be voted upon. In this letter he took strong ground against the proposed change in the tenure of judicial office, and in the mode of appointing the judges. He utterly condemned the elective system, particularly with the tenure of office proposed, as a

dangerous experiment, offering, as he believed, no securities for obtaining a judicatory of high qualifications, and calculated to establish a dependence of the judges on a master — the sovereign here, as the king was sovereign in England when judges were removable at the royal pleasure or the royal caprice — and wholly incompatible with that fearlessness, that lofty dignity, that unapproachable elevation of place and character, which made the judiciary in England, in modern times, and in this country, the pride and glory of these lands, and the admiration of the world. Such were his opinions boldly expressed, and presented and reasoned with all the force and masterly vigor of his best years. He did not, of course, expect to arrest the resistless flow of the popular current of the time; but he meant to perform a last solemn duty towards his countrymen, according to his undoubting convictions, and to utter a last solemn warning, as of the voice of age and experience, of reflection and wisdom, sent back to them from the borders of the grave. We are now upon that new experiment, which must be tried, and ought to be judged of on all hands with candor. It is generally conceded that it has had a more promising beginning than the fears of many led them to predict or expect; and it is not at all certain that such an impressive lesson as that read to us by this venerable judge and patriarch, did not itself produce an effect in inducing caution and some restraint of party exclusiveness, in putting the system into operation; and, moreover,

that it may not, in time to come, exercise a salutary and healthful influence over the practical working of the experiment. It is not, however, always safe to predict how a new mode or measure in government or in jurisprudence will turn out, merely from the appearance things may chance to put on at the beginning. Tacitus said in his day—*Initia magistratuum nostrorum meliora firma, finis inclinat.*

Our narrative draws to a conclusion. A few words only, touching a topic or two to my mind of surpassing interest, remain to be spoken. I have mentioned in this discourse the name of Gen. John Armstrong—a name too familiar to the country to need that I should here say who and what he was. Of his superior abilities nobody has ever doubted, but there have been various opinions of his merits as a public man. He encountered the strong distrust of his countrymen at an early day, from his being known as the author of the much talked-of and little understood Newburgh Letters. And at a later period, he was not fortunate enough to secure popularity, or even to escape popular censure, in his management of the department of war, in our second struggle with England. As a political man, he never courted, and certainly never enjoyed the love of the people—though he claimed to have had quite as much love for them, and when in public employment to have served his country quite as faithfully in its best interests, as many others who have lived more in the breath of popular applause. But whatever others thought of him, or may think

of him, he had at least this proof of merit, that from his youthful days down to the close of his long life, he enjoyed the full confidence, the unaffected admiration, and the warm regard of Judge Spencer. They were friends; and a more beautiful friendship—one of purer sentiment, of stronger devotion, of more touching affection, and of greater constancy—has rarely existed between men any where, from the days of David and Jonathan to the present time. It began in the year 1797. The next year they came out together, no doubt by a mutual understanding and from mutual conviction, both having previously supported the Constitution, and the administration of Washington, as Federalists, and took their stand with the Republican Party of the period. Gen. Armstrong could never bring himself to take much concern in the mere strifes of party, or to lead in the marshalling and management of the forces of party. But his friend would not submit to have him excluded from public employment, and the country lose the benefit of his services, for that reason, or because he lacked the equivocal merit of mere popularity. In 1800, Judge Spencer, being then, with Mr. Clinton, in office, and high in influence, procured the election of Gen. Armstrong to the Senate of the United States—an election which was secured to him by nearly a unanimous vote of the Legislature. In 1804, he received an appointment to the honorable post of Minister to France; and it may well be supposed that the efforts and influence of his friend were not wanting

in his behalf on that occasion. Again in 1812, when Judge Spencer might have commanded for himself almost any official position at Washington it might have suited his ambition to occupy; with the chances, too, of making his way to the highest of all; he chose rather to stipulate for a more able and vigorous administration of the department of war, by the substitution of his friend Gen. Armstrong for Dr. Eustis, as the Secretary. Nor did his views for the advancement of his friend stop there; for when, pretty early after the second election of Mr. Madison, the subject of finding a successor to him began to be agitated, and it was supposed from the lead this state had taken in the war that the candidate might come from New York, he took measures promptly to bring out the name of Gen. Armstrong, and created a strong impression, for the time, in the public mind in his favor; giving him his decided preference over Mr. Clinton, who was his brother-in-law, and refusing to countenance the aspirations of Gov. Tompkins, with whom he was then intimately associated, in bringing the powerful aid of this state to the support and prosecution of the war.

But there were not wanting other and more interesting proofs still, of his devoted and disinterested attachment. The cloud which passed over the fame and prospects of Gen. Armstrong, especially on account of the successful invasion of the American capital by the British in 1814, only bound the two friends in closer union; and as the confidence

of the country was apparently, and as they felt and believed unjustly, withdrawn from one of them, the other was only the more firm and earnest in the open and public vindication and support of him.

A correspondence was faithfully kept up between these gentlemen for the whole period of forty-five years during which their friendship lasted. It is a correspondence of the highest interest, from its confidential and affectionate character, as well as from the eventful, and often trying times and scenes through which they were passing; a correspondence, I venture to affirm, from the few specimens that have fallen under my notice, from the perusal of which no man could rise, without feeling that he had been permitted to look on humanity, in the persons of two men of the highest talent and genius, in an aspect of disinterestedness, purity, grace, and beauty, which, perhaps, otherwise he would scarcely believe was to be found in so selfish and evil a world. In the conclusion of this correspondence, the most deeply interesting fact of all that relates to the friendship of these remarkable men, is disclosed; and that is, that as they had not been separated in their lives, so in their deaths they were not to be divided. They were to take their leave of this world, holding a common faith, and with the same "reasonable, religious and holy hope" of immortality.

———Supremum,
Carpere iter comites parati.

Judge Spencer had withdrawn to his retired resi-

dence at Lyons, a philosopher; but it was soon made apparent that, in that retirement, he was to be more than a philosopher — he was to be a Christian. He was then, in a great measure, alone. His last wife was dead already — for he had been three times married, and this one, the last of the three, a sister of Mr. Clinton (as was also his second wife, who lived only a few months from her marriage), had died in 1837. Of his children, some were living, and others were dead. One of them had brought him honor in his death, having fallen in battle in the war of 1812. Another had brought him more distinguished honor still, in his life. *Decori decus addit avito.* All who survived, were the pride and comfort of his age; but none were then resident with him. His house, therefore, though not desolate or sad, was yet in a measure solitary. He had strong and vigorous health, preserved by great regularity and strict temperance; and this continued nearly unimpaired down to his last mortal sickness. His spirits were habitually elastic and cheerful. There was nothing of gloom about him in his retirement; yet he was more alone than he had ever been before, and every thing was favorable for communion with his own spirit, for contemplation and serious thought. He turned his attention to religion — for which he had always felt and preserved a becoming reverence — but cherishing now a new interest in the subject; and he employed his powers, so admirably trained and used to deep investigation, in looking into the evidences of Christ-

ianity, and taking up and weighing the foundations of that holy faith. The result could not be doubtful. What Hale, and Newton, and Boyle, and Chateaubriand, and Marshall had found before him, that, by the blessing of God, he found. He was a Christian; and henceforth this man of giant mind might be seen, bowed and kneeling, in the temper and with the simplicity of a little child, at his chosen altar of worship, a professed disciple of Jesus Christ, and habitually "showing forth his death till his coming again," in the Sacrament of the Lord's Supper. He was in communion with the Episcopal church. In the new state of mind to which he had been brought, it was natural that he should turn with even unwonted interest towards the cherished friend of his heart and his life. He had now to perform towards him the last, the most solemn, and the most touching act of his whole life-long course of friendship and brotherly love. He wrote promptly to Gen. Armstrong, to inform him of his religious thoughts and opinions, and to bring the gentle persuasives of his own example and his earnest convictions to bear on his aged friend. It was a timely and successful mission of love and mercy on which his letter was sent. Gen. Armstrong was then — it was in 1842 — already feeling the hand of age begin to press heavily upon him; and he died in the spring of the next year. On the receipt of Judge Spencer's letter, he was led to give the subject of Christianity and its neglected claims upon him, an immediate and earnest consideration; and the re-

sult was, that he received and embraced the religion so affectionately commended to him, and was admitted, at his own request, to the Holy Sacrament of the Eucharist. I need not say, what a well-spring of consolation all this was in the bosom of his surviving, sorrowing, and yet rejoicing friend.

Judge Spencer died on the 13th of March, 1848, at 10 o'clock in the morning, in the eighty-third year of his age. For several months before his decease he had languished under severe physical suffering; and the nature of his disease, with his great age, allowed scarcely a hope to be indulged of his recovery. He waited in patience to die. His children gathered about him to minister to his comfort, and bless his aged sight with their presence. Passing events in the world without, still interested him, and he would have his thoughts about them, but he did not allow any of these things to disturb the perfect repose of his spirit in the near presence of the Angel of Death. In severe paroxysms of his disease, and in seasons of mortal debility, there was some apparent giving way of his faculties; a partial suspension of the powers of memory. Generally, however, his mind, though less active, seemed scarcely less sound and capable than in other years. But time wore on, and Death was making slow, but visible and sure approaches; yet his step was noiseless, and his coming without terror. At length the aged man slept—and they looked, and behold, it was the sleep of Death!

If the Ruler of the world sometimes commissions

the higher intelligences of his creation in the ministry of his beneficent purposes towards the dwellers on this earth, they are not the only agencies thus called into his service. It is visibly manifest, that he employs great and good men also in the same sort of ministry. And happy are they who are so employed and so honored; and thrice happy when, as the day of their pilgrimage draws to a close and the shadows of evening come on, they are permitted to look back on their course, and believe that their country, and the world, are the better—are wiser and happier—for their life and labors.

Hoc est vivere bis,
Vita posse priore frui.

And I know not what we ought to thank God for devoutly, if not for the lives and labors of such men. Few have been more fortunate in conferring enduring benefits on their country and kind than the venerable man whose life we have been commemorating. I refer chiefly to what he has done for American Jurisprudence. Those benefits are not of a nature to be doubted about or denied now, or to perish hereafter. They will endure; and future and far distant generations, looking upon them and living under the enjoyment of them in peace, will hold his name in perpetual reverence and honor.